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REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 99.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1878.

REPORTED BY

WILLIAM T. OTTO.

VOL. IX.

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1903

Entered according to Act of Congress, in the year 1879, by
LITTLE, BROWN, AND COMPANY,
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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD.	HON. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. STEPHEN J. FIELD.
HON. WILLIAM STRONG.	HON. JOSEPH P. BRADLEY.
HON. WARD HUNT.	HON. JOHN M. HARLAN.

ATTORNEY-GENERAL.

HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WHELEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

As made April 22, 1878, under the Acts of Congress of July 23, 1866, and March 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.		
Hon. M. R. WAITE, Ohio.	FOURTH. Maryland, West Virginia, Virginia, N. Carolina, and S. Carolina.	1874. Jan. 21. President Grant.
ASSOCIATES.		
Hon. N. CLIFFORD, Maine.	FIRST. Maine, New Hampshire, Massachusetts, and Rhode Island.	1858. Jan. 12. President Buchanan.
Hon. WARD HUNT, New York.	SECOND. New York, Vermont, and Connecticut.	1872. Dec. 11. President Grant.
Hon. WM. STRONG, Pennsylvania.	THIRD. Pennsylvania, New Jersey, and Delaware.	1870. Feb. 18. President Grant.
Hon. J. P. BRADLEY, New Jersey.	FIFTH. Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.	1870. March 21. President Grant.
Hon. N. H. SWAYNE, Ohio.	SIXTH. Ohio, Michigan, Kentucky, & Tennessee.	1862. Jan. 24. President Lincoln.
Hon. J. M. HARLAN, Kentucky.	SEVENTH. Indiana, Illinois, and Wisconsin.	1877. Nov. 29. President Hayes.
Hon. S. F. MILLER, Iowa.	EIGHTH. Minnesota, Iowa, Missouri, Kansas, Arkansas, & Nebraska.	1862. July 16. President Lincoln.
Hon. S. J. FIELD, California.	NINTH. California, Oregon, and Nevada.	1863. March 10. President Lincoln

MR. JUSTICE HUNT, *by reason of indisposition, took no part in deciding the cases reported in this volume.*

MEMORANDA.

THE Bar of the Supreme Court of the United States met in the court-room, in the Capitol, Washington, on Friday morning, Jan. 10, 1879, at eleven o'clock, to pay respect to the memory of the late CALEB CUSHING.

The Hon. WILLIAM M. EVARTS was appointed Chairman, and DANIEL WESLEY MIDDLETON, Esq., Secretary. On motion, the Chairman appointed Mr. PHILIP PHILLIPS, Mr. CHARLES DEVENS, Mr. ROSCOE CONKLING, Mr. ALBERT PIKE, Mr. A. T. AKERMAN, and Mr. GEORGE H. WILLIAMS a committee to draft resolutions expressive of the respect of the members of the Bar for the memory of the deceased.

The committee reported the following resolutions:—

Resolved, That the members of the Bar of the Supreme Court of the United States have with deep regret been informed of the death of CALEB CUSHING, for many years an able practitioner before the Court.

Resolved, That while the memory of Mr. CUSHING deserves to be cherished as a citizen and a soldier, as a scholar and a historian, as a statesman and a diplomatist, the Bar desires especially to remember him to-day as a wise legislator, as an accomplished publicist, and as a profound and learned lawyer, whose services in all these capacities have been most honorable to himself and most valuable to the Republic.

Resolved, That the Attorney-General be requested to communicate these resolutions to the Court, and to move that they be entered of record.

Resolved, That they be communicated to the family of Mr. CUSHING, with the expression of the earnest condolence of the Bar.

The resolutions were unanimously adopted, and the meeting then adjourned.

On Jan. 13, the ATTORNEY-GENERAL addressed the Court as follows:—

May it please your Honors:—

I ask a few moments' delay in the regular progress of the business of the Court, that I may bring formally to its attention the decease of CALEB CUSHING, of Massachusetts.

The high positions held by him in the service of the country, his eloquence, his learning and ability, so often displayed in the debates of this court, seem to render it proper that we should pause for some notice of the void which has been occasioned by his departure.

At the age of twenty-five, Mr. CUSHING was already a distinguished figure in the politics of Massachusetts. Ten years later he came into the National Councils, and from that time was prominent, alike in sunshine and in storm, in the

long historic era over which his life extended. How full that life was of important and varied public service will be seen when it is recalled that he was repeatedly a member of the legislature of his native State and of our National Congress, that he was a Justice of the Supreme Judicial Court of Massachusetts, that he was the Counsel of the United States in the Arbitration at Geneva, that he was its Foreign Minister at the Courts of China and of Spain, that he was the Attorney-General of the United States, and that to these civil services he added military service as a General in the Army during the war with Mexico.

In private character and in social intercourse Mr. CUSHING was most attractive. His rare powers of conversation, his large and well-digested stores of learning, made him a fascinating companion to all who listened to him, while his readiness and cordial desire to serve others by the multitude of resources at his command were always conspicuous.

Of his extended public career, of the political controversies in which he engaged or into which he was thrown, the present is not the time to speak While one who has filled so large a space in public affairs must be judged as his life shall appear when viewed by the clear light of impartial history, the hour when he departs is not the time to disturb the ashes which have gathered over the slumbering fires of old and, in many instances, forgotten controversies. Nor, were this the time, would this ever be the place for their appropriate discussion. Yet it is appropriate to remember here, that so profound was his knowledge of international law, and of politics in the larger sense of the term, that to those administrations with which he was not officially connected, nor even in direct sympathy, as counsellor in matters of a general character as distinguished from those of mere party controversy, he was able to lend an aid that was deemed to be great and valuable.

Elsewhere justice will be done to his merits as an accurate observer and a graceful writer, to his accomplishments as a scholar and a linguist, and to his labors for the country as one of its statesmen and diplomatists. Here, and to-day, we would desire to recall him as the wise and profound lawyer, whose learning and ability have contributed to the discussion of many of the most important questions of his time.

His judicial career on the Supreme Bench of his native State was brief, but it was long enough to establish his reputation as a courteous, just, and able magistrate. But his true sphere as a lawyer was that of the advocate. His intellect was of the controversial cast, which adapted him for the conflicts of the Bar rather than the calmer and graver duties of the Bench. Yet, while he was an opponent vigorous and persistent, he was always fair and candid. As a debater he was master of every resource, eloquent and adroit, always speaking from a full knowledge of the subject. He spared no labor in preparation, and his ready powers of acquisition enabled him to fortify himself with weapons of attack and defence drawn from every armory and storehouse of the law. The Reports of this Court furnish the evidence of the ability with which he discussed all matters, whether appearing as Counsel for private parties or for the Government. The Opinions of the Attorneys-General attest how much skill and research he brought to those practical questions of administration which as a cabinet officer demanded from him the judgment of a learned and experienced lawyer. Nor should I fail to remember that as a legislator, alike in his native State and in the Congress of the United States, he, even when deeply engrossed in the public conflicts of his time, contributed wisely and generously

to that public legislation which is independent of party controversy. The volume of the Revised Statutes of the United States which lies within reach of the hands of your Honors demonstrates his habits of patient labor, although from its nature it could not testify to his genius as a legislator. By that exhaustive industry which would be content with no half-knowledge of any subject, but which would master each in turn, he supplemented, as successive occasions arose, his large knowledge of the science of government, of jurisprudence, of equity, of the common, the statute, and the maritime law, and of commercial and industrial affairs.

The illustrious magistrates who composed this Bench while he filled the office of Attorney-General have, with one exception, passed away. With some premonition, perhaps, that his own end was near (although he did not desist from projects of labor and study), Mr. CUSHING, since his return from Madrid, a little more than a year ago, resided principally at his old home in Newburyport. The anchor of the storm-worn ship was to fall where first its pennant had fluttered in the breeze. On the second day of this month, near the spot which had given him birth seventy-nine years before, he, too, went to his rest in the city which had honored and loved him in his youth, his manhood, and his maturer years.

The Bar of this Court have desired me, in testimony of their respect for his memory, to submit to the Court the resolutions which I now have the honor to read.

After the resolutions had been read, Mr. CHIEF JUSTICE WAITE replied as follows:—

The prominent position which Mr. CUSHING occupied in public affairs during so much of his long life, his great learning, his distinguished services as Attorney-General of the United States, and his large and varied practice at this Bar, make it proper that his brethren should be permitted to place upon the records of the Court their tribute to his memory. The Court cordially approves of the resolutions that have been adopted, and of the remarks of the Attorney-General in presenting them. What has been said is no more than is due to the occasion.

It was my fortune to be associated with Mr. CUSHING before the Tribunal of Arbitration at Geneva, and I should be false to my own feelings if I failed to record an expression of gratitude for the kindness and encouragement I received at his hands during all the time we were thus together. He was always just towards his juniors, and on that occasion he laid open his vast storehouse of knowledge for the free use of us all. While assuming that our success would be his, he was willing that his should be ours. He knew how much encouragement can lighten the burden of labor, and never failed to give it when opportunity was offered. Whatever he may have been to others, to us who were with him at Geneva he will be remembered as a wise and prudent counsellor and a faithful friend.

The resolutions and the remarks of the Attorney-General may be entered upon the records of the Court.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1878.

WOLF *v.* STIX.

1. If goods sold by a debtor with intent to defraud his creditors are attached as his property in a chancery suit to recover a debt and set aside the sale, which is brought against him and the purchaser, and the latter, with sureties, executes to the complainants a replevin bond, authorized by statute, and conditioned that he, claiming the goods as his property, will pay the ascertained value of them as expressed in the bond, should he be cast in the suit, and they be decreed to be subject to the attachment, and liable thereunder to the satisfaction of the debt sued for, his liability on the bond is not a debt created by fraud within sect. 5117 of the Revised Statutes, which provides that such a debt shall not be barred by a discharge in bankruptcy; but if the petition in bankruptcy was filed after the execution of the bond, and before the rendition of the decree determining the right of property in the goods, his liability is a contingent one, which, under sect. 5068 of the Revised Statutes, is provable against his estate in the proper bankrupt court.
2. His discharge in bankruptcy releases him from further liability, but does not affect that of his sureties on the bond.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

On the 8th of December, 1866, Louis Stix & Co. commenced a suit in the Chancery Court of Shelby County, Tennessee, against Marks, Pump, & Co. and M. Wolf, to recover a debt owing by Marks, Pump, & Co., and to set aside a sale of goods by the latter firm to Wolf, on the ground, as alleged, that it had been made to defraud creditors. In accordance with the

practice in that State, a writ of attachment was sued out and levied upon the goods in the possession of Wolf.

The Code of Tennessee provides that (sect. 3509) "the defendant to an attachment suit may always replevy the property attached by giving bond with good security, payable to the plaintiff, in double the amount of the plaintiff's demand, or, at defendant's option, in double the value of the property attached, conditioned to pay the debt, interest, and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit;" and that (sect. 3514) "the court may enter up judgment or decree upon the bond, in the event of recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by delivery of the property or its value, or payment of the recovery, as the case may be." As soon as the attachment was served, Wolf moved the court to ascertain the value of the goods and fix the amount of the bond to be given in replevying them. This was done, and the value ascertained to be $10,000; and on the 24th of December, 1866, Wolf, as principal, and Lowenstein and Helman, as his sureties, filed in the cause their bond, a copy of which is as follows:—

"We, M. Wolf, as principal, and Elias Lowenstein and Leon Helman, as sureties, hereby bind ourselves unto Louis Stix & Co. in the sum of $20,000.

"The condition of the above bond is that, whereas, in the suit now pending in the Chancery Court at Memphis, in favor of said Louis Stix & Co. and against Marks, Pump, & Co., and in which said Wolf is joined as a defendant, an attachment has been issued against said Marks, Pump, & Co. for $18,699.54, besides interest and costs, and has been levied upon a stock of goods and other property as the property of said Marks, Pump, & Co., which were in the possession of said M. Wolf, and were and are claimed by him as his property; and this bond is given by him for the purpose of replevying said stock of goods and other property attached, being, altogether, as it is agreed by the parties, of the value of ten thousand ($10,000) dollars. Now, in the event said M. Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump, & Co., then and in that

event, should said Wolf pay to complainants, as the court may order and direct, the said sum of $10,000, the value of said stock of goods and other property, with interest thereon from this date, this bond shall be void, otherwise to remain in full force and effect.

"Witness our hands and seals, this —— day of December, 1866.

"M. WOLF. [L. S.]
"ELIAS LOWENSTEIN. [L. S.]
"L. HELMAN." [L. S.]

The property attached was thereupon surrendered to Wolf. All the members of the firm of Marks, Pump, & Co. were afterwards discharged in bankruptcy, and in due time, by leave of the court, they severally filed formal pleas setting up their respective discharges. Wolf put in his answer, claiming title to the goods and denying all fraud. Testimony was taken; and on the 13th of December, 1872, after hearing, the Chancery Court found and decreed that there was no fraud in the sale to Wolf, and dismissed the suit as to him. As Marks, Pump, & Co. had been discharged in bankruptcy, it was also dismissed as to them. From this decree Stix & Co. appealed to the Supreme Court on the 21st of March, 1873. On the 28th of March, 1874, Wolf obtained on his petition therefor a discharge under the bankrupt law. On the 28th of April, 1877, the Supreme Court, upon hearing, reversed the decree of the Chancery Court, and, after finding the amount due from Marks, Pump, & Co., and ordering a recovery, concluded as follows: —

"And this court being of opinion, as before recited, that said sale was fraudulent and void, and that said stock of goods, fixtures, &c., so attached and replevied, were subject to said attachment, and liable for complainants' said debt. And it further appearing from simple calculation that said sum of $10,000, with interest from the date of said bond, Dec. 24, 1866, to the present time, amounts to the sum of $16,200: it is, therefore, further ordered, adjudged, and decreed by the court, that said fraudulent sale be and is hereby set aside, and for naught held, as to complainants' said debts herein against defendants Marks, Pump, & Co., and that the complainants Louis Stix & Co. in their own right, and also for the use of Rinskoff Bros. & Co., do have and recover of and from the defendant M. Wolf, and Elias Lowenstein and L. Helman his

sureties on the aforesaid replevin bond, the said sum of $16,200, the value of the property replevied, and interest thereon to this date, for which execution may issue. And it further appearing from the record that the said defendants, Marks, Pump, & Co., have been since the filing of complainants' bill discharged in bankruptcy, no execution is awarded against them for complainants' recoveries herein; and the cost of this cause, and the court below, will be paid out of the said recovery of $16,200, against defendant M. Wolf and his aforesaid sureties on replevin bond."

On the third day of May, 1877, after this decree was rendered, Wolf and his sureties petitioned the court for leave to come in and plead in that court the discharge of Wolf in bankruptcy; but this was denied, as no new defence could be made in that court, and it was not allowable to set up the defence of bankruptcy by any proceedings there for that purpose.

On the 26th of May, 1877, these appellants filed this bill in the Chancery Court of Shelby County, setting forth the facts substantially as above stated, and praying that the judgment or decree of the Supreme Court might be decreed to be satisfied, and of no force and effect, by reason of the discharge of Wolf in bankruptcy, and that Stix & Co. might be enjoined from enforcing the collection.

The case was afterwards removed to the Circuit Court of the United States for the Western District of Tennessee. The answer of Stix & Co. does not deny any of the material facts alleged in the bill, but sets up as a defence: —

1. That the discharge of Wolf does not release him from his liability upon the decree of the Supreme Court, because the decree is founded upon a debt created by fraud;

2. That if Wolf is discharged, his co-complainants, the sureties upon his bond, are not; and,

3. That the appellants have been guilty of such laches as to cut them off from relief in a court of equity.

The Circuit Court dismissed the bill, and from a decree to that effect this appeal has been taken; the appellants assigning for error that the court below erred, 1. In dismissing the bill; 2. In not decreeing that the appellees should be perpetually enjoined from enforcing the decree rendered by the Supreme Court of Tennessee in their favor against the appellants.

Mr. William M. Randolph and *Mr. Henry Craft* for the appellants.

The Code of Tennessee (sect. 3509) gave Wolf the right to execute the bond and replevy the goods, which were then in the custody of the law. His doing so cannot, therefore, by the most strained construction of the act of Congress, be regarded as creating a debt by fraud or embezzlement; *executo juris non habet injuriam.* There must be positive fraud or fraud in fact. *Neal* v. *Clark*, 95 U. S. 704. The debt arose out of the bond which he executed to the appellees, for it cannot be seriously insisted that he incurred any other liability to them; and they, as parties to that instrument, are estopped from showing that it was tainted with fraud. *Palmer* v. *Preston*, 45 Vt. 154; *Sherman* v. *Strauss*, 52 N. Y. 404; *Brown* v. *Broach*, 52 Miss. 536; *Fowler* v. *Treadwell*, 24 Me. 377; *Jones* v. *Knox*, 46 Ala. 53. The conveyance under which he held them when they were attached has no connection with the bond, and his liability upon the latter was extinguished by his discharge in bankruptcy.

In order that the bond shall remain in full force and effect as to the sureties, Wolf must be "cast" in the attachment suit. He cannot, by reason of his discharge in bankruptcy, be so cast, as under the decision of this court in *Wolf* v. *Stix* (96 U. S. 541) he is, in view of the peculiar practice which prevails in Tennessee, entitled to relief by this bill, and it furnishes him an appropriate and efficient remedy for asserting the rights and exemptions which that discharge secures. The decree of the Supreme Court has no validity against him; and it could not have been rendered if the rules of that court had permitted him to plead the discharge granted to him after the appeal had been taken, and when it was pending there. The contingency, therefore, upon which the liability of the sureties depends — a valid decree or judgment against him which can be enforced — has not arisen, and it cannot arise. The condition of the bond has been discharged, and they are released. *Smith* v. *Eakin*, 2 Sneed (Tenn.), 456; *Carren* v. *Breed*, 2 Cold. (Tenn.) 465; *Payne* v. *Able*, 7 Bush (Ky.), 344; *Odell* v. *Worten*, 38 Ga. 224; *Loring* v. *Eager*, 3 Cush. (Mass.) 188; *Carpenter* v. *Turrell*, 100 Mass. 450; *Hamilton* v. *Bryant*, 114

id. 543; *Braley* v. *Boomer*, 116 id. 127; *Williams* v. *Atkinson*, 36 Tex. 16; *Nettleton* v. *Billings*, 17 N. H. 458; *Kirby* v. *Garrison*, 1 Zab. (N. J.) 179; *Barber* v. *Rodgers*, 71 Pa. St. 362; *Herbert* v. *Horter*, 81 id. 89.

Wolf's discharge will be of no practical benefit to him, so far as the liability in question is concerned, if his sureties be bound. If they are compelled to pay, his liability to them at once accrues. *Loring* v. *Kendall*, 67 Mass. 305; *Fowler* v. *Kendall*, 44 Me. 448; *Ellis* v. *Ham*, 28 id. 385; *Leighton* v. *Atkins*, 35 id. 118; *Holbrook* v. *Fox*, 27 id. 441; *Porter* v. *McDonald*, 32 id. 418; *Pogue* v. *Joyner*, 6 Ark. 241.

Mr. Josiah Patterson, contra.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

This cause may be considered as supplementary to that of *Wolf* v. *Stix*, 96 U. S. 541. It is in fact the suit in chancery referred to in the opinion in that case as furnishing the complainants an appropriate remedy for enforcing their rights growing out of the discharge of Wolf in bankruptcy during the pendency of the original cause on appeal in the Supreme Court, and before the final judgment as rendered in that court. In addition to *Anderson* v. *Reaves*, cited in the argument of the other case, we are now referred to the following cases as establishing the same practice: *Ward* v. *Tunstall*, 58 Tenn. 319; *Riggs* v. *White*, 4 Heisk. (Tenn.) 503; and *Longley* v. *Swayne*, id. 506. In *Ward* v. *Tunstall* the rule is thus stated: "On the record when presented, to which we can alone look, in our view of the case, a judgment can be rendered, and then if the debtor desires to be relieved he will find no difficulty in being protected from payment of improper judgments in the bankrupt court, or by an original proceeding in the State court, where he can make such issues as will raise the question, and as he is precluded from interposing his defence arising out of his bankruptcy, the judgment will not interfere with his case in any way." But it is unnecessary to pursue this branch of the case further, as we do not understand that the position assumed by the appellants is disputed.

The two questions which have alone been argued here in behalf of the appellees are: —

1. Whether the liability of Wolf was one created by fraud, within the meaning of sect. 5117, Rev. Stat., which provides that 'no debt created by fraud . . . shall be discharged in bankruptcy." And,

2. Whether if Wolf was discharged his sureties were also.

1. As to Wolf.

In *Neal* v. *Clark* (95 U. S. 704) it was decided that "fraud," as used in this section of the bankrupt law, "means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud or fraud in law, which may exist without imputation of bad faith or immorality." With this definition we are content. It is founded both on reason and authority. Clearly it does not include such fraud as the law implies from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the collection of their debts. But if it did, such a purchase does not create a debt from the purchaser to the creditors. As between the debtor and the purchaser the sale is good, but as between a creditor and the purchaser it is void. The purchaser does not subject himself to a liability to pay to creditors the value of what he buys. All the risk he runs is that the sale may be avoided, and the property reclaimed for their benefit. To come within this exception in the Bankrupt Act the debt must be created by fraud. The debt of Wolf in this case was not created by his purchase of the goods, but by his bond to pay their value if he failed to sustain his title. In this there was no fraud. It was a right the statute gave him as the claimant of the property, and he availed himself of it in a lawful way. He thus perfected his title to the goods by agreeing to pay their value if his original purchase should be held to be invalid. A debt thus incurred cannot be said to be created by fraud. It occupies in this respect the same position it would if Wolf, acknowledging the invalidity of his original purchase, had, without suit, given his note to the creditors for the value of the goods in order to perfect his title.

The debt thus created was provable under the Bankrupt Act.

It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event would ever occur which would require the payment was uncertain; but if it did occur, the amount to be paid was fixed. This clearly is such a case as was provided for in sect. 5068, Rev. Stat., which is, that "in all cases of contingent debts and contingent liabilities contracted by the bankrupt, . . . the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend." There is nothing in the case of *Riggin* v. *Magwire* (15 Wall. 549) in conflict with this. That case arose under the bankrupt law of 1841, which was somewhat, though perhaps not materially, different from that of 1867 in this particular, and not only the happening of the event on which payment was to be made, but the amount to be paid, was uncertain and contingent. The amount to be paid depended materially upon the time when the event happened. Every thing was uncertain. The obligation in this case is to pay $10,000 and interest, if, upon the trial of the suit in the progress of which the bond was executed, it should be adjudged that the goods attached were subject to the attachment, and liable thereunder to the satisfaction of the debt sued for. As, therefore, the debt of Wolf was not created by fraud, and was provable under the act, it follows that his discharge released him from his liability on the bond. The discharge would have been a bar to a judgment against him, if, before the judgment, it could have been pleaded as a defence to the action. It follows that, under the practice which prevails in Tennessee in this class of cases, Wolf is entitled to the relief he asks for himself.

2. As to the sureties.

Sect. 5118, Rev. Stat., provides that "no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be

rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like. But here the bond was not given to dissolve the attachment. That was issued against the property of Marks, Pump, & Co.; and in order to get possession of the goods which had been attached, and which Wolf claimed as his own, he subjected his bond to the operation of the attachment which was to continue in force, and took the goods away. In legal effect, he purchased the interest of the creditors in the goods, and, with Lowenstein and Helman as his sureties, agreed to pay the creditors $10,000, if, upon the trial of the suit in which the attachment was issued, it should appear that they had any interest to sell. In this obligation Lowenstein and Helman were jointly bound with Wolf, and their liability was made to depend, not upon the recovery of a money judgment against him, but upon a judgment that the title he acquired by his purchase from Marks, Pump, & Co. was void as against the attaching creditors. The case stands precisely the same as it would if Wolf and his sureties had entered into a contract with the attaching creditors, in a form authorized by law, to take the goods from the sheriff and pay $10,000, if on the trial it should be determined that the attachment was valid, and this was a suit on that contract. Clearly, under such circumstances, it could not be successfully contended that Wolf's bankruptcy released his sureties.

As we understand the practice in Tennessee, the parties are to have the same relief in this action they would have been entitled to in the original suit, if, before the judgment, Wolf's discharge in bankruptcy could have been pleaded. This proceeding performs the office of such a plea, and enforces the same rights.

Had the plea been filed, it would have shown a discharge of Wolf from his liability, but not that of his sureties. They were bound not to pay any judgment which might be rendered against him, but to pay the debt he had agreed to pay in a

certain event, which had happened. The judgment which the Code of Tennessee authorizes in such cases is upon the bond according to its tenor and effect, and if the principal debtor is discharged his sureties must respond, as in other cases of joint liability. They are no more released by his discharge than they would be from a note or ordinary money bond which they had signed as his sureties.

No question has been raised as to the effect of the bankruptcy of Marks, Pump, & Co., and it is unnecessary, therefore, to take time to consider it.

Our conclusion is, that as to Wolf the decree is erroneous, and should be reversed, but as to Lowenstein and Helman, that it was right, and should be affirmed.

The cause is remanded with instructions to modify the decree below in such manner as to give to Wolf the benefit of his discharge in bankruptcy, as stated in this opinion, but to leave it in all other respects in force. The costs in this appeal must be paid by the appellees; and it is

So ordered.

UNITED STATES *v.* FARDEN.

1 A., a collector of internal revenue, was suspended, Sept. 23, 1873, from office, upon charges of fraud, by the supervisor, who reported his action to the commissioner, in accordance with sect. 3163 of the Revised Statutes. The Secretary of the Treasury, Sept. 26, directed B., the deputy collector of the district, to assume the duties of collector, as of Sept. 23, in place of A., and to continue in office until some person should be appointed thereto and duly qualified. A. died Oct. 16. A collector, appointed Nov. 9, took the oath and gave the required bond, Dec. 1, but did not take possession of the office until Dec. 10. B. performed the duties of collector from Sept 23 to and including Dec. 9. *Held*, that B. was entitled to the compensation of collector during the whole period.

2. Under the last clause of the first section of the act of March 1, 1869 (15 Stat. 282), providing that a deputy collector of internal revenue shall not receive compensation as collector, when the latter is entitled to compensation for services rendered during the same period of time, a collector suspended for fraud, and rendering no services thereafter, is not entitled to compensation so as to exclude the deputy collector therefrom; and the better opinion is that that provision is repealed by its omission from 16 Stat. 179; Rev Stat., sect. 3150.

APPEAL from the Court of Claims.

This was an action by Joseph S. Farden against the United States to recover pay for his services as acting collector of internal revenue for the second district of Alabama.

The Court of Claims found the following facts: —

1. On the twenty-third day of September, 1873, the claimant was deputy collector of Francis Widner, then collector of internal revenue for the second district of Alabama, when said Widner was suspended from office by K. R. Cobb, a supervisor of internal revenue, for fraud, and his action reported to the commissioner.

2. The commissioner thereupon sent the following telegram to J. C. Lotz, a revenue agent, and the order therein contained was immediately complied with: —

"WASHINGTON, Sept. 23, 1873.

"J. C. LOTZ, *Montgomery, Alabama*,

"The Secretary will designate Joseph S. Farden as acting collector from this date. Put him in possession of the office.

"J. W. DOUGLASS,

"*Commissioner.*"

And thereafter the Secretary of the Treasury issued the following order: —

"TREASURY DEPARTMENT,

"WASHINGTON, D. C., Sept. 26, 1873.

"SIR, — Under the provisions of the fortieth section, act of June 30, 1864, as amended by the first section, act of March 3, 1865, you are hereby directed to perform the duties of the office of collector of internal revenue for the second district of Alabama, *vice* Francis Widner, suspended.

"This order will take effect from the 23d inst., and will continue in force until some person shall have been designated or appointed to the office and duly qualified according to law.

"You will receive this through the Commissioner of Internal Revenue, who is hereby directed to give you the necessary instruction with reference to the performance of your duties as prescribed by law.

"I am, very respectfully,

"WM. A. RICHARDSON,

"*Secretary.*

"MR. JOSEPH S. FARDEN,

"*Deputy Collector, &c., Montgomery, Ala.*"

3. Said Widner died Oct. 16, 1873, and on the ninth day of November, 1873, P. D. Barker was appointed and commissioned as collector of said district, and took the oath of office and gave the bond required on the first day of December, 1873.

The following notice was sent to claimant by the Commissioner of Internal Revenue, and on the tenth day of December, 1873, and not before, said Barker took possession of the office, and all books, papers, and property pertaining thereto were then turned over to him: —

"WASHINGTON, Nov. 25, 1873.

"SIR, — Prelate D. Barker having been appointed collector of internal revenue for the second district of Alabama, and having duly qualified as such collector, I have to direct you to turn over and deliver to him all books, papers, and property pertaining to collector's office of said district whenever he shall present himself and request you to do so.

"Very respectfully,

"J. W. DOUGLASS,

"*Commissioner.*

"JOSEPH S. FARDEN, Esq.,

"*Acting Collector, 2d Dist., Montgomery, Ala.*"

4. The claimant performed the duties of collector of said district as such acting collector from Sept. 23 to Dec. 9, 1873, inclusive, under said orders set forth in the second finding.

5. The compensation fixed by the Secretary of the Treasury, in lieu of the salary and commissions prescribed by law, for the personal salary of the collector of said district was $3,000 a year, and of the deputy collector, $1,500 a year.

6. For the time from the 23d of September to the 15th of October, inclusive, the claimant has been paid $89.67, the compensation fixed for deputy collector, and no more; for the time between Oct. 15 and Nov. 30, 1873, inclusive, he has been paid the full compensation of collector; and for the first nine days in December he has been paid nothing.

The court found as a conclusion of law that the claimant was entitled to recover $163.05, that being the compensation of a collector from Sept. 23 to Dec. 9, 1873, inclusive, less the amount which had been paid to him.

The United States then appealed here.

The Solicitor-General for the United States.

The statutes which bear upon the question involved are as follows: —

"That in case of the sickness or temporary disability of a collector to discharge such of his duties as cannot under existing laws be discharged by a deputy, they may be devolved by him upon one of his deputies; and for the official acts and defaults of such deputy the collector and his sureties shall be held responsible to the United States. Act of June 30, 1864, sect. 39; 13 Stat. 288.

"*That in case of a vacancy occurring in the office of collector, by reason of death or any other cause*, the deputies of such collector shall continue to act until his successor is appointed; and the deputy of such collector longest in service at the time immediately preceding shall, until a successor is appointed, discharge all the duties of said collector; and for the official acts and defaults of such deputy a remedy shall be had on the official bond of the collector, as in other cases; and of two or more deputy collectors appointed on the same day, the one residing nearest the residence of the collector at the time of his death, resignation, or removal, shall discharge the said duties until the appointment of a successor: *Provided, that in case it shall appear to the Secretary of the Treasury that the interest of the government shall so require, he may, by his order, direct said duties to be performed by such other one of the said deputies as he may in such order designate.* And any bond or security taken from a deputy by such collector pursuant to this act shall be available to his legal representatives and sureties to indemnify them for loss or damage accruing from any act of the deputy so continuing or succeeding to the duties of such collector. Act of June 30, 1864, sect. 40, amended [see Italics] by sect. 9 of the act of March 2, 1867, 14 id. 473, and by the act of March 3, 1865, 13 id. 471.

"That from and after the passage of this act no assessor or collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector or assessor, but a supervisor of internal revenue may, within his territorial district, suspend any collector or assessor for fraud or gross neglect of duty, or abuse of power, and shall immediately report his action to the Commissioner of Internal Revenue, with his reasons therefor, in writing, who shall thereupon take such further action as he may deem proper. Act of July 20, 1868, sect. 51; 15 id. 145.

"That any deputy collector of internal revenue who has performed, or may hereafter perform, under authority or requirement of law, the duties of collector of internal revenue, *in consequence of any vacancy in the office of such collector*, shall be entitled to and receive so much of the same pay and compensation as is provided by law for such collector; but no such payment shall in any case be made when the collector has received, or is entitled to receive, compensation for services rendered during the same period of time. Act of March 1, 1869, sect. 1; id. 282.

"That the true intent and meaning of an act approved March 1, 1869, entitled 'An Act to allow deputy collectors of internal revenue acting as collectors the pay of collectors, and for other purposes,' is as follows, to wit: That any deputy collector of internal revenue who has performed, or may hereafter perform, under authority of law, the duties of collector of internal revenue, in consequence of any vacancy in the office of said collector, shall be entitled to, and shall receive, the salary and commissions allowed by law to such collector, or the allowance in lieu of said salary and commissions allowed by the Secretary of the Treasury to such collector, and that the Secretary of the Treasury is authorized to make to the said deputy collector such allowance in lieu of salary and commissions as he would by law be authorized to make to said collector. And said deputy collector shall not be debarred from receiving said salary and commissions, or allowances in lieu thereof, by reason of the holding of another Federal office by said collector during the time for which said deputy collector acts as collector: *Provided*, that all payments to said deputy collector shall be upon duly audited vouchers." Act of July 1, 1870; 16 id. 179.

The temporary suspension of the collector by the supervisor did not create a vacancy, nor forfeit his claim to compensation. The action of the supervisor may not have been ultimately sustained, upon a full investigation of the causes which prompted it. In that event, the suspended officer would re-enter upon the discharge of his duties. Such is not the case where a removal is made or a resignation accepted. The right of the incumbent to the salary thereupon ceases, inasmuch as his relations to the service are dissolved, and cannot be restored without a new appointment.

It has been urged that the parties acted upon "the theory of an existing vacancy." That cannot, however, affect the merits

of the question, nor is the court bound by an officer's mistaken impression of the law or the facts.

The act of March 2, 1867, regulating the tenure of certain civil officers (14 Stat. 430), is cited by the learned court below. It is said that, under its provisions, the collector might have been suspended by the President in the recess of the Senate, that during such suspension he would not be entitled to pay, and that, under *Wilcox* v. *Jackson* (13 Pet. 498), the act of the head of a department is presumed to be the act of the President.

The collector being under the supervisory power of the Treasury Department, a notice to him from its head that he was suspended by the President would undoubtedly be regarded as conclusive proof of the fact. But the assumption that the President suspended the collector and designated Farden to perform the duties of collector is negatived by the first finding of the court below that the supervisor suspended the collector. Farden does not in his petition claim, nor does the court find, that he took the oath of office as collector, or gave bond as such, which, by that act, he would have been required to do before he could act or be entitled to compensation; and the Secretary of the Treasury expressly informed him that he was directed, under the acts of 1864 and 1865, to perform the duties of the suspended officer.

Barker was duly appointed as collector, and he qualified as such Dec. 1. He thereby filled the vacancy caused by Widner's death, and was from that date entitled to compensation. Farden's claim to be thereafter paid as collector was properly rejected by the accounting officers of the treasury.

The amount involved is trivial, but the principles underlying the case are important.

Mr. I. G. Kimball, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Compensation of the collector of internal revenue for the district, as fixed by the Secretary of the Treasury in lieu of the salary and commissions prescribed by law, is the annual sum of $3,000. 15 Stat. 231.

Such collectors may appoint as many deputies as they may

think proper, to be by them compensated for their services. Rev. Stat., sect. 3148.

Deputy collectors who, under the authority of law, perform the duties of a collector, in consequence of a vacancy in the office of collector, are entitled to receive the salary and commissions allowed by law to such collector, or the allowance fixed by the Secretary of the Treasury, as compensation to the collector, in lieu of the salary and commissions prescribed by Congress. Id., sect. 3150; 15 Stat. 252.

Charges of fraud were made against the collector of internal revenue for the district, and he was suspended from his office by the supervisor, who made due report of his action in the premises to the commissioner. Pursuant to the act of Congress, the Secretary of the Treasury, on the 26th of September, 1873, gave the plaintiff, who was the deputy collector of the district, the following instructions: "You are hereby directed to perform the duties of the office of internal revenue collector for the district, *vice* Francis Widner, suspended;" which was accompanied with the statement that the order should take effect from the 23d inst., and that it would continue in force until some person should be designated or appointed to the office and duly qualified according to law.

By the finding of the court it also appears that the plaintiff as such acting collector performed the duties of collector of the district from the 23d of September, 1873, to and including nine days in the month of December following. From the 23d of September to the 15th of October he was only paid the compensation allowed to him as deputy collector, and from that time to the 30th of the succeeding month he was paid the full compensation allowed to the collector, and for the remainder of the time of his service as collector he was paid nothing.

Appended to the findings of the court is their conclusion of law, which is that the claimant is entitled to recover $163.05, in conformity with the opinion of the court as published in the transcript. Judgment was rendered in favor of the claimant for that amount, and the United States appealed to this court.

Appellants do not deny that the claimant performed the services alleged in the petition, but they allege that he is only

entitled to compensation as internal-revenue collector for the period from October 15 to December 1, and that he has been fully paid for his services as such collector during that whole period, which proposition is sustained by the finding of the court below; but they assign for error that there was no vacancy in the office of collector for any other portion of the time during which the claimant performed the duties of collector.

Attempt is made in argument to support that theory by the third finding of the court, from which it appears that the suspended collector died on the 16th of October next after he was suspended from office, and that his successor was appointed on the first day of the succeeding December, which is conceded; but the same finding of the court shows that the new collector did not take possession of the office until ten days later, from which it appears that the finding of the court in respect to the first nine days of that month is correct to a demonstration.

Suppose that is so, still it is insisted in behalf of the appellants that there was no vacancy in the office of collector during the lifetime of the suspended collector, and that the judgment of the court below in allowing the claimant compensation as collector during the period from the suspension of the collector to his death is erroneous, which is the principal question in the case presented for decision. He was paid for his services during that period as deputy collector, but the court below held that he was entitled to the compensation allowed by law to a collector, and gave judgment in his favor for the difference, adding thereto a collector's compensation for the nine days which elapsed after the new collector was appointed before he took possession of the office.

Two contingencies arise when the deputy collector may perform the duties of such collector: 1. When the collector is sick, or is temporarily unable to discharge the duties of the office, the provision is that he may devolve the same upon one of his deputies, but the collector and his sureties in that case remain responsible for the official acts and defaults of the deputy. 2. In case of a vacancy in the office of the collector, when the senior deputy shall discharge all the duties of the

collector, unless the Secretary of the Treasury shall direct that his duties shall be performed by some other one of the deputies, the enactment being that the deputy who performs the duty of the collector in consequence of a vacancy shall be entitled to receive the salary and commissions allowed by law to such collector. Rev. Stat., sect. 3149, 3150.

Supervisors at that period were empowered by notice in writing to suspend any collector of internal revenue from duty for fraud, or gross neglect of duty, or abuse of power, and it was made his duty immediately to report his action to the commissioner, with his reasons therefor, in writing. Id., sect. 3163. Fraud was the accusation against the collector in this case, and it was for fraud that he was suspended from the office of collector, and it appears that the supervisor made due report in writing of his action to the commissioner.

Difficulties would attend the effort to define with precision the relation which the suspended individual bore to the office of collector of internal revenue after the order of suspension went into practical effect, nor is it necessary, in the judgment of the court, to make any such attempt in the present case. Whatever the legal relation of the individual may have been in the strict technical sense, it is clear, we think, that for all practical purposes, during the continuance of the order of suspension, the office was vacant, and without any incumbent to discharge the duties which the law requires to be performed by the collector of the internal revenue. Plainly it was not a case of sickness or temporary disability, and consequently the duties were not devolved upon the deputy as in that case made and provided.

Prompt report in writing was made by the supervisor to the commissioner; and the finding of the court below shows that he immediately despatched a telegram to the agent of the Treasury Department to designate the claimant as acting collector from that date, and to put him in possession of the office. Exactly the same view of the subject was taken by the Secretary of the Treasury, as appears by his communication to the claimant, in which he said, "You are hereby directed to perform the duties of the office of collector of internal revenue, *vice* Francis Widner, suspended, and to continue in office until some

person shall have been designated or appointed to the office and duly qualified according to law."

Nothing can be plainer in legal decision than the proposition that, unless the Secretary of the Treasury assumed that a vacancy existed in the office, he could not and would not have given the directions which are contained in that communication.

Under the Tenure-of-Office Act the President had the power at that time, which was during the recess of the Senate, to suspend the collector until the next session of the Senate, and the act of the Secretary, the head of the Treasury Department, is presumed to be the act of the President. *Wilcox* v. *Jackson*, 13 Pet. 498.

Some support to the opposite theory, it is supposed, may be derived from the last clause of the first section of the original act regulating the compensation to deputy collectors in such cases, but the court here is entirely of a different opinion. By that clause it is provided that no such payment shall in any case be made where the collector has received or is entitled to receive compensation for services rendered during the same period of time. 13 Stat. 282.

Grave doubts are entertained whether this provision can be construed to give any support to the theory of the defendants, that the collector is entitled to compensation during the same period of time, as he rendered no services; and inasmuch as he was suspended for fraud, it is difficult to see what claim he can have for the salary attached to the office during the period of his suspension, when the duties were performed by the deputy collector. Even if the original provision could be interpreted as supposed, still the better opinion is that it is not in force. It was left out of the act of Congress passed the next year to define the true intent and meaning of the provision, and is not contained in the Revised Statutes. 16 id. 174; Rev. Stat., sect. 3150.

Suffice it to say that the court, in view of the whole case, is of the opinion that the claimant is entitled to receive the salary and commissions allowed by law to the collector of internal revenue during the period that he performed those duties under the direction of the Secretary of the Treasury, as found by the

court below, and that the suspension by the supervisor of internal revenue, and the action of the Secretary of the Treasury directing him to continue in the office until a successor to the suspended officer was appointed and qualified, created such a vacancy, within the meaning of the act of Congress, for all practical purposes in the administration of the duties of the office as entitles the claimant to that compensation. Assume that to be so, and it follows that there is no error in the record.

Judgment affirmed.

HUSSEY *v.* SMITH.

An incorporated town in Utah was situate on public lands, which were duly entered at the proper land-office by the mayor, to whom a patent was issued under the act of March 2, 1867 (14 Stat. 541). The legislature of the Territory, as authorized by that act, enacted the requisite rules and regulations for the disposal of the lots in the town, and provided that the party who was the rightful owner of possession, or occupant, or was entitled to the occupancy or possession of a lot, should on certain conditions be entitled to a deed therefor from the mayor. A mode whereby contesting claims should be determined was prescribed. A., before the lands were entered, was in the possession of a lot, and mortgaged it to B., but thereafter remained in possession. In a foreclosure suit brought in the proper court against A., wherein the process sued out was served by the marshal of the United States for that Territory, a decree was rendered whereunder he, still acting as the ministerial officer of that court, under the decision of the local courts that he was entitled so to do, made sale of the lot to C. The sale was confirmed by the court, and C. conveyed the lot to D., a non-resident. A. and D. respectively claimed a deed from the mayor. *Held*, 1. That A.'s interest in the lot, before the lands were entered, could be the subject of a sale or mortgage. 2. That although this court subsequently decided that the marshal could act only in cases where the United States was concerned, his doings in the premises were those of an officer *de facto;* that by his service of the process the court acquired jurisdiction of the person of A.; that the sale under the decree extinguished A.'s right to the lot; and that D. was entitled to a deed therefor from the mayor.

APPEAL from the Supreme Court of the Territory of Utah.

The act of March 2, 1867, entitled "An Act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867 (14 Stat. 541), provides: Whenever

any portion of the public lands of the United States have been or shall be settled upon and occupied as a town site, and therefore not subject to an entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town may be situated, to enter at the proper land-office and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated, &c.

In accordance with this act the legislature of Utah, by an act approved Feb. 17, 1869, made the necessary "rules and regulations;" and in November, 1871, Daniel Wells, as mayor of the city of Salt Lake, entered certain lands in that Territory as "the town site" of said city, wherein was included the lot which is in controversy in this suit. On the thirtieth day of September, 1868, Job Smith, then and for many years prior thereto in possession of the lot, and the owner thereof, subject only to the paramount title of the United States, executed to one Bernhisel a mortgage of all "his right of possession, claim, and interest in and to the lot," to secure the payment of a certain sum of money in one year thereafter. In September, 1869, Smith executed another mortgage of the lot to one Linforth, to secure the sum of $1,058.43, payable twelve months from that date. On the third day of December, 1870, Bernhisel filed his bill of foreclosure in the District Court of the third judicial district of that Territory against Smith and Linforth. The process sued out was served by the marshal of the United States for the Territory. A decree was rendered by default in favor of Bernhisel. Pursuant thereto the marshal sold the lot, and on the thirteenth day of March, 1871, the court, on his report of his doings, approved and confirmed the sale to William Jennings, to whom the marshal made a deed for the lot. Jennings conveyed it, March 9, 1872, to Hussey, a resident of the State of Ohio.

Smith remained in possession of the lot, and Dec. 11, 1872, filed in the Probate Court his written statement, pursuant to said act of the Territory, claiming that he, under its provisions, was entitled to a deed, and praying that he be adjudged to be the lawful owner. Hussey filed a similar statement, which was amended May 24, 1872.

It was adjudged that Smith was entitled to a deed from the mayor of the city of Salt Lake, and that a certificate of title should issue to him therefor. To the same effect was the judgment of the District Court and that of the Supreme Court. Hussey then appealed here.

Mr. Samuel A. Merritt in support of the decree below.

1. Hussey, being a non-resident of Salt Lake City, was not one of the beneficiaries of the legislation of Congress. Long before and at the time the lands were entered "in trust for the several use and benefit of the occupants thereof," Smith was in the actual occupation of the lot, and has since remained in possession of it. He is, therefore, justly entitled to the benefits which Congress designed to bestow.

2. The decree by default in the foreclosure suit was a nullity. The service of process by the marshal of the United States conferred upon the court no jurisdiction of the defendants. He can only act in cases where the United States is concerned (*Clinton et al.* v. *Englebrecht*, 13 Wall. 434), and his sale of the lot under the decree passed no title.

Mr. Z. Snow and *Mr. E. D. Hoge*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

There can be no question that under the act of Congress of March 2, 1867 (14 Stat. 541), Smith had an equitable interest in the premises in controversy which he could sell and convey. *Phyfe* v. *Wardell*, 5 Paige (N. Y.), 268; *Armour* v. *Alexander*, 10 id. 571; *Tredgill* v. *Pintard*, 12 How. 24. Until the mayor of Salt Lake City made the entry at the proper land-office, which he was authorized to make, the legal title was in the United States. By the entry it became vested in the mayor. He held the entire tract so entered "in trust for the several use and benefit of the occupants thereof, according to their respective interests." Such is the language of the statute.

The act does not prohibit a sale, but is silent upon the subject. Smith mortgaged to Bernhisel, and subsequently to Linforth. Bernhisel foreclosed, making Smith and Linforth defendants. Under a decree of the proper court, the premises were sold by the United States marshal. Jennings became the purchaser, and thereafter sold and conveyed to the appellant, by deed bearing date March 9, 1872. On the 24th of May, 1872, the appellant filed her claim pursuant to law in the proper probate court, for a judgment to enable her to obtain a deed from the mayor for the premises. Smith had before filed a claim also. On the 10th of July, 1872, the Probate Court decided in favor of Smith. She thereupon appealed to the District Court. The decision of the probate judge was affirmed. She then appealed to the Supreme Court of the Territory. The judgment of the Probate Court was again affirmed, and she thereupon removed the case by appeal to this court.

The validity of the mortgage to Bernhisel is not controverted, nor is it denied that, if the foreclosure and sale divested Smith's title, the judgment of the Supreme Court of the Territory was erroneous, and must be reversed.

It was held by that court that the foreclosure proceedings were void, for two reasons: —

First, That the mortgage was not sufficiently described in the complainant's petition to warrant the decree *pro confesso*, which was taken.

Second, That the United States marshal, by whom the original process in the case was served, the sale made, and the deed to the purchaser executed, had no authority to act in any wise in the premises.

The first objection is clearly untenable, and has not been insisted upon here. We therefore pass it by without further notice.

The second objection is necessary to be considered.

There were two marshals in the Territory, — one appointed by the national government, the other under a territorial law. The former was called the marshal of the United States, the latter, marshal of the Territory.

A question arose which officer was entitled to serve the processes issuing from the local courts. A case was brought

in the proper district court to settle their respective claims. On the 12th of May, 1870, that court decided that the right and authority belonged exclusively to the marshal of the United States. The Supreme Court of the Territory, at its October Term in the same year, affirmed this judgment. Such was then understood to be the law, and the marshal of the United States proceeded in the performance of his official functions, having the field to himself, until the subject came under the consideration of this court in *Clinton et al.* v. *Englebrecht*, 13 Wall. 434. It was then held (on the 15th of April, 1872) that the marshal of the United States had such authority only in cases where the United States were concerned.

It will thus be seen that the period of his recognized right and of its uninterrupted exercise extended from May 12, 1870, to April 15, 1872. Within that time all the proceedings in the Bernhisel foreclosure case were had. The petition to foreclose was filed, the process was issued and served upon Smith, the decree was taken, the sale was made, and the marshal's deed was executed to Jennings. During all this time the marshal's acts were valid, as being those of an officer *de facto*. They were *as much so* as if they had been done by him *de jure*. These remarks apply with full force to his acts as a ministerial officer in the Bernhisel case. An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Wilcox* v. *Smith*, 5 Wend. (N. Y.) 231; *Gilliam* v. *Reddick*, 4 Ired. (N. C.) L. 368; *Brown* v. *Lunt*, 37 Me. 423. Judicial as well as ministerial officers may be in this position. Freeman on Judgments, sect. 148. The acts of such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils.

The marshal's sale and deed to Jennings extinguished the entire right of Smith to the premises. Thereafter he stood to them in the relation of a stranger. All the title which he possessed when the mortgage was executed passed from him to Jennings, and from Jennings to the appellant.

The territorial law of Utah of Feb. 17, 1869 (Compiled

Laws of Utah, 879), authorized to be passed by the act of Congress before mentioned, gave to the party "*entitled* to the occupancy or possession," as well as to the "occupant or occupants," the right to apply for the judgment by the Probate Court, upon which, when rendered, the mayor was to execute his deed. If this were not so, the right would be clearly within the equity of the act of Congress, and conferred by it.

The rejection of the appellant's claim and the adjudication in favor of Smith, who had not then a shadow of right to the premises, by the Probate Court was, therefore, a gross error, and the Supreme Court of the Territory repeated it by affirming the judgment.

The judgment of the latter court will, therefore, be reversed, and the cause remanded with directions to proceed in conformity to this opinion; and it is

So ordered.

NOTE. — *Hussey* v. *Merritt*, appeal from the Supreme Court of the Territory of Utah, was argued at the same time and by the same counsel as was the preceding case. MR. JUSTICE SWAYNE stated that the opinion in that case was decisive of this. The cardinal question here, as there, was as to the validity of the proceedings touching the sale under the Bernhisel mortgage, and the result must be the same.

MILLS v. SCOTT.

1. The statute of Georgia of March 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before Jan. 1, 1870, does not apply to claims against the estate of a deceased person, so as to exclude the time which a previous statute allowed to administrators to ascertain the condition of the estate, and to creditors to file their claims.
2. A court of equity is the proper tribunal to ascertain the proportion of indebtedness chargeable to a stockholder of a bank on his personal liability. But as by the law of the State, as declared by its highest tribunal, an action of debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation, a similar action at law will be sustained in such cases in the Circuit Court of the United States.

8. Where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose.

ERROR to the Circuit Court of the United States for the Southern District of Georgia.

The facts are stated in the opinion of the court.

Mr. Walter S. Chisholm for the plaintiff in error.

Mr. A. T. Akerman for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action at law against the administrator of the estate of George Hall, deceased, upon bills of the Merchants' and Planters' Bank of Savannah, Georgia, amounting to over $100,000. The deceased was, on the 1st of January, 1860, and up to the time of his death, the owner of one thousand shares of the capital stock of that bank, of the nominal value of $100 a share. A clause in the charter of the bank provided that "the persons and property of the stockholders" should be liable for the redemption of its bills and notes at any time issued, in proportion to the number of shares held by them. The plaintiff was the owner of the bills in suit, and as they were not paid on presentation, he brought an action upon them against the bank in the Circuit Court of the United States for the Southern District of Georgia, and recovered judgment, upon which execution was issued and returned unsatisfied. He then brought this action to charge the estate of the deceased, Hall, under the provision of the charter mentioned.

To the declaration the defendant pleaded the general issue and the Statute of Limitations of March 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before the 1st of January, 1870, or be for ever barred. To the special plea the plaintiff interposed a demurrer, and it was agreed in arguing it that the following facts should be considered as set forth in the plea; namely, that George Hall was domiciled in Connecticut, and died there

in 1868, leaving a will; that there was no administration in Georgia on his estate until Aug. 9, 1869, when letters of administration *ad colligendum* were granted to the defendant, Mills; and that permanent letters of administration, with the will annexed, were granted to him on June 7, 1869.

The court sustained the demurrer and struck out the plea. The case was then tried upon the general issue, and the plaintiff obtained a verdict for the sum of $100,000, of which sum $31,354 was to be made out of the property of the deceased, then in the hands of the administrator, and the remainder out of property which might subsequently come into his hands. Upon this verdict, judgment being entered, the defendant brought the case to this court on a writ of error.

The principal questions presented for our consideration are: 1st, whether the statute of March 16, 1869, is a bar to the action; and, 2d, whether an action at law by a bill-holder to charge a stockholder will lie under the charter of the bank; and, if so, whether the declaration will sustain the finding of the jury.

The statute of March 16, 1869, was intended to bring all claims to an early determination. It was passed, as recited in its preamble, on account of the confusion which had "grown out of the disturbed condition of affairs during the late war," and because of doubts entertained relative to the law of limitation of actions "which should be put to rest." It was a measure well calculated to bring disputed controversies to a speedy settlement. The time prescribed within which actions were to be brought was only nine months and fifteen days. In the case of *Terry* v. *Anderson* (95 U. S. 628), it was held by this court that the act was not open to any constitutional objection because of the shortness of this period. The question in such cases, the court said, was whether the time allowed was, under all the circumstances, reasonable; and of this the legislature of the State was primarily the judge, and its decision would not be overruled unless a palpable error had been committed. Looking at the circumstances under which the legislature had acted, amidst the disasters which had affected the fortunes, property, and business of almost every one in the State, the court could not say that the time mentioned was unreasonable. "Society

demanded," observed the Chief Justice, "that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things;" and for that purpose, whilst the obligations of old contracts could not be impaired, "their prompt enforcement could be insisted upon or an abandonment claimed."

There is in the statute no exception in terms of any class of cases; yet such a construction must be given to its provisions as not to impair the operation of other laws, which it is not reasonable to suppose the legislature intended to repeal. The law of the State relating to the administration of the estates of deceased persons contains various provisions, which in many particulars would be defeated if the statute of March 16, 1869, was held applicable to actions in behalf of the estates or against them. Thus, administrators are allowed twelve months from the date of their qualification to ascertain the condition of the estates confided to their charge; creditors are required to present their claims within this period; and no suits to recover a debt of the decedents can be brought until its expiration. Sects. 2530, 2548, and 3348. The Supreme Court of the State has accordingly held that the statute of 1869 does not affect this exemption from suit for the period designated, but that its spirit and equity require that suits against administrators upon the claims mentioned should be brought within a similar period after twelve months from the grant of administration; that is, within nine months and fifteen days afterwards. Such is the purport of its decision in *Moravian Seminary* v. *Atwood* (50 Ga. 382), and that decision has since been followed in several cases. *Edwards, Adm'r*, v. *Ross*, 58 Ga. 147. In conformity with them we must hold that the statute was not a bar to the present action. There was no administrator of the estate of Hall appointed in Georgia, even for temporary purposes, until April 9, 1869, and this action was commenced Dec. 30, 1870, which was within the period required after the expiration of the year of exemption.

Whether the present action can be maintained, it being an action at law by a bill-holder to charge the estate of a deceased stockholder, depends upon the construction given to the clause of the charter of the bank, prescribing the personal liability of

the stockholders. The language of the clause, so far as it bears upon this case, is that "the persons and property of the stockholders shall at all times be liable, pledged, and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess." This provision is held by the Supreme Court of the State to create a personal liability on the part of the stockholder for all the notes of the bank in the proportion that the shares held by him bear to all the shares of its capital stock, which any bill-holder can enforce, upon the insolvency of the bank, by separate action to the extent of his claim. *Lane* v. *Morris*, 8 Ga. 468; *Dozier* v. *Thornton*, 19 id. 325. Such liability may undoubtedly be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one, as was held by this court in *Pollard* v. *Bailey*, 20 Wall. 520. See also *Terry* v. *Tubman*, 92 U. S. 156. The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the bank, and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose. But by the law of the State, as declared by its highest tribunal, an action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases, the extent of the latter's liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation. Actions for debt will always lie where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation. Here the declaration states the number of shares of the capital stock of the bank to be twenty thousand, and that one thousand were held by the deceased. His liability, therefore, was fixed at one-twentieth of the entire indebtedness of the bank on the bills issued by it, which is averred to be $800,000. The only recovery, therefore, which the declaration permitted was for $40,000, and not for $100,000, which the jury found. This error in the record is not specifically pointed out in the brief of counsel for the defendant, who was not present at the argument; but it is evident that it was at the erroneous apportionment of the

indebtedness to the estate of the deceased that he aimed, when insisting that the remedy of the plaintiff should have been by a bill in equity, and not in this form of action.

Be this as it may, where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will, of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose.

This cause will, therefore, be remanded to the court below with directions to grant a new trial, unless the plaintiff, within a period to be designated by the court, consent to remit from the judgment the excess over $40,000; and it is

So ordered.

QUINN v. UNITED STATES.

A contract between the United States and A., for his removal of the rock at the entrance of a certain harbor, provided that he should complete the work at a specified time, and that if he should delay or be unable to proceed with it in accordance with the contract, the officer in charge might terminate the contract, and employ others to complete the work, deducting expenses from any money due or owing to A., who was also to be responsible for any damages caused to others by his delay or non-compliance. Payment upon the completion and acceptance of the several sections was to be made, reserving ten per cent therefrom until the completion and acceptance of the whole work. The work was not completed at the specified time, chiefly in consequence of the failure of a third party to deliver to A. the necessary explosive, and the officer in charge terminated the contract; but the evidence does not show that his action was wrongful. The work was completed by other parties at much lower terms. A. brought suit against the United States. *Held*, that the United States having sustained no loss by the failure of A., he is entitled to the reserved ten per cent, but not to the profits that he would have made had he performed the contract, nor to the difference between the contract price and that at which the work was completed by others.

APPEAL from the Court of Claims.

The facts are sufficiently stated in the opinion of the court.

Mr. T. D. Lincoln for the appellant.

The Attorney-General and *The Solicitor-General, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

On the tenth day of August, 1867, David Quinn, the appellant's intestate, entered into a written contract with J. B. Wheeler, of the engineer corps for the United States, to remove the rock at the entrance of Eagle Harbor, Michigan, and deposit it at such point as the engineer in charge should direct; and he agreed to commence the work on or before the first day of September thereafter, and complete the removal of the rock on or before Oct. 1, 1868. "It was also agreed that if, in any event, the contractor shall delay, or be unable to proceed with the work in accordance with its terms, the engineer officer in charge shall have full right and authority to take away the contract, and employ others to complete the work, deducting the expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or non-compliance."

He was to be paid for his work as sections of it were completed to the required depth, the government reserving ten per cent from such payments until the whole was completed and accepted.

Quinn having failed to complete the work by the 1st of October, it was taken from him on the 9th of November, 1868, and, after advertising, let to other parties. For all the work completed he was paid at the contract price, except that the government retained ten per cent on the estimated sum.

He brings this suit in the Court of Claims on the contract, and his petition being dismissed he appeals to this court.

He claims that he was wrongfully prevented from completing his work, and is entitled to the profits he would have made, to wit, $58,682; or, if not this, that the United States, by letting the contract to other parties, had the work done for $33,060 less than they agreed to pay him, and he claims that sum. He claims, in any event, the ten per cent retained, amounting to $1,740.

In support of the claims for profits on work not performed by him, two propositions are advanced: —

1. That although the time had elapsed within which claimant was bound by the contract to complete the work, and it

was unfinished, the engineer had no lawful authority to terminate the contract, because the fault in the delay was in the government and its officers.

2. That conceding the authority to terminate the contract was lawfully exercised, the consequence was that when the work was done by the government, or by other contractors at its instance, such work was done at his risk of loss or of profit, and if, when finished, it cost the United States more than it would if done under his contract, he was responsible for the loss, and if done for less, the gain was his.

We cannot concur in this latter proposition.

It seems very doubtful if, in the event of the termination of his contract under the clause authorizing the engineer to do so, the contractor is liable to the United States for any thing beyond the ten per cent retained. This ten per cent is retained, in the language of the contract, until the whole shall be completed. It is retained as security for that end. The work is to be completed by others, and the expenses deducted from any money that may *be due him*. He is to be responsible for damages caused to *others* by the delay. If, therefore, he is responsible to the United States beyond the sum due him at the time the contract is taken from him, it is not by the express terms of the contract, but on the general doctrine of damages on failure to fulfil any contract.

So, on the other hand, we think it equally clear that when his contract is rightfully terminated, he is entitled to no further rights in regard to its performance by others. The government does not, by reason of being compelled by his failures to resume control of the work, do so for his benefit, but for its own. They do not thus become his agents to do the work for him which he failed to do, and let him reap the profits of a work which he refused or neglected to perform.

Nor are we able to see that the contract was wrongfully taken from him.

It may very well be contended that the engineer in charge is by the agreement of the parties made the judge of the existence of "such delay or inability to proceed with the work in accordance with the contract" as justifies him in taking it away, and that his action in that regard is conclusive. But the

counsel for the United States have not assumed that ground here, and it is not necessary to the decision of the case.

It may be safely asserted, however, that it will be presumed that his action was well founded until it is impeached by satisfactory evidence, and especially where, as in this case, the time limited for the completion of the work had passed. Such evidence is wanting in this case. It is true that there was some delay in the autumn of 1867 on the part of the engineers in locating the precise point where the rock was to be excavated and in determining the low-water mark with reference to which all the work was to be done, and this was not perfected until February, 1868. But there is no evidence that Quinn demanded that this should be done sooner, or that he desired to commence his work earlier.

There is satisfactory evidence that his delay was caused mainly, if not solely, by his inability to procure the nitro-glycerine which, under his plan of working, was the only explosive that he could use. He had the entire work honeycombed with cells drilled for the reception of this explosive in due time, and if he could have procured it, would have completed the work in time, or at least his contract would not have been taken away. The excuse is that the party who had contracted to deliver the nitro-glycerine failed in business and failed to deliver. But the authority of the engineer to terminate the contract did not depend on the value of excuses or the difficulty of performance. He had "full right and authority" to do this for inability to proceed with the work according to the contract, as well as for delay.

There was both delay and inability in this case, and we do not see that they were due to any failure on the part of the government.

In this connection it is said that Quinn should receive pay for the holes drilled for reception of the explosive in that part of the work not completed when it was taken from him. But the finding of the Court of Claims is that this was not used by the government or by the subsequent contractor, because the latter used gunpowder, which could not be profitably exploded in the holes drilled for the nitro-glycerine.

We think that the Court of Claims was right in reject-

ing the two first items of the claim as we have mentioned them.

But it is otherwise with regard to the ten per cent of the price of the work completed, retained by the government.

We have already seen that this was retained for the purpose of securing the completion of the work, and that if not completed by the contractor it was to be used in paying the expenses of such completion. In our view, it is a fair construction of this part of the agreement that the money retained under it is for security that the contractor will not abandon his work, but will proceed in it with due vigor, and for indemnity to the United States in case he fails to do this. Unless, therefore, the government has sustained some loss, some pecuniary or legal damage by his failure, the money which he has fairly earned should be paid to him when the work which he agreed to do has been completed, though by others. In the case before us the United States made a clear gain of $33,000 by taking away his contract and making a new and more advantageous one with another person. Under such circumstances, the United States no longer has a right to the money withheld for indemnity and security, because the risk is over, the event has occurred, and instead of loss or damage there has been a gain by the transaction.

The judgment of the Court of Claims dismissing the petition will therefore be reversed, and the case remanded to that court with directions to render a judgment for claimant for the sum of $1,740; and it is

So ordered.

UNITED STATES v. AMES.

1. A bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty, is in the subsequent proceedings a substitute for the property; and the question whether a case is made for the recall of the property must be determined before a final decree on the bond is rendered in the District Court, or in the Circuit Court on appeal. Action on that question cannot be reviewed here.
2. A decree rendered on such a bond given with sureties by the claimant at the request and for the benefit of his firm, to which the property so delivered to him belonged, bars a suit against the other partners.
3. The fact that the adverse party had no knowledge touching the ownership of the property, and that, by reason of the insolvency of the defendants, payment of the decree cannot be enforced, affords, in the absence of fraud, misrepresentation, or mistake, no ground for relief in equity.
4. Conclusions of law are not admitted by a demurrer.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. E. S. Mansfield and *Mr. G. A. Somerby* for the appellant.

Mr. George O. Shattuck and *Mr. Oliver W. Holmes, Jr.*, *contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Judicial cognizance of prize cases is derived from that article of the Constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from Congress than what was conferred by the ninth section of the Judiciary Act, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section. *Glass* v. *The Betsey*, 3 Dall. 6; *The Admiral*, 3 Wall. 603; *Jennings* v. *Carson*, 1 Pet. Adm. 7; 1 Kent, Com. (12th ed.) 355; 2 Stat. 781, sect. 6.

Admiralty courts proceed according to the principles, rules,

and usages which belong to the admiralty as contradistinguished from the courts of common law. *Manro* v. *Almeida*, 10 Wheat. 478; 1 Stat. 276.

Seizure of the property and the usual notice precede the appearance of the claimant; but when those steps are taken, the owner or his agent, if he desires to defend the suit, must enter his appearance in the case, and the court may, in its discretion, require the party proposing to appear and defend the suit to give security for costs as a preliminary condition to the granting of such leave.

Due appearance having been entered, the claimant, if he wishes to avoid the inconvenience and expense of having the property detained until the termination of the suit, may apply to the court at any time to have the property released on giving bond, which application it is competent for the court to grant or refuse.

Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promoter of the suit. It is to be considered as a security, not for the amount of the claim, but simply for the value of the property arrested, to the extent of the claim and costs of suit, if any, beyond the preliminary stipulation. Williams & Bruce, Prac. 210.

Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court. *The Palmyra*, 12 Wheat. 1; *The Wanata*, 95 U. S. 611; *The Steamer Webb*, 14 Wall. 406.

Fees and expenses of keeping the property having been paid, it is the duty of the marshal to surrender the property as directed in the order of release; and it is settled law that if any one, in defiance of the order, unlawfully detains the same he is liable to be proceeded against by attachment. *The Towan*, 8 Jurist, 223; *The Tritonia*, 5 Notes of Cases, 111.

Concisely stated, the material facts as derived from the

allegations of the bill of complaint are as follows: 1. That a certain steamboat was with her cargo, consisting of eleven hundred and twenty bales of cotton, seized as enemy property. 2. That proceedings, on the 23d of March, 1865, were commenced against the property in the District Court for the Eastern District of Louisiana, to procure a decree of forfeiture of the property, the charge being that the cargo was obtained within territory occupied by armed public enemies. 3. That the person named in the bill of complaint appeared in the suit as claimant of the cargo, and obtained an order of the court that the cargo of cotton might be released to the claimant, he, the claimant, giving bond to the complainants in the sum of $350,000, with good and solvent security. 4. That the claimant on the following day, in pursuance of the order, filed the required bond to the amount specified in open court, duly executed by the claimant as principal and with sureties accepted by the court as satisfactory. 5. That the marshal on the same day, in compliance with the order of the court, released and delivered the cargo to the claimant. 6. That on the 10th of May following the District Court entered a decree in the suit dismissing the libel and ordered that the cargo seized be restored to the claimant, from which decree the complainants appealed to the Circuit Court. 7. That the Circuit Court on the 8th of June then next reversed the decree of the District Court and entered a decree condemning the steamboat and her cargo as forfeited to the United States, and condemning the claimant to pay to the complainants $204,982.28, with interest, and a decree in the usual form against the sureties. 8. That the decree last named is in full force, and that neither the claimant nor sureties have ever paid the same or any part thereof to the complainants. 9. *Nulla bona* having been returned upon the execution, the present bill of complaint was filed in the name of the United States; and the prayer is that the executors of Oakes Ames may be decreed to admit assets in their hands sufficient to pay and satisfy the aforesaid decree and interest, and that it be decreed that they shall pay the amount of the decree and interest to the complainants.

Certain other matters are also set forth in the bill of com-

plaint which it is alleged entitle the complainants to the relief prayed, of which the following are the most material: 1. That at the time of the seizure of the steamboat and her cargo, and at the time the bond for the release of the cargo was given, and at the time the decree was entered against the claimant and his sureties in the bond, the testator of the executors named as respondents and the other respondent named were partners of the claimant under the firm and style alleged in the bill of complaint, and that the partners in the course of the partnership business purchased the cargo of the steamboat for the benefit of the partnership, and that the other two partners well knew of the commencement of the suit by the complainants to procure a decree of forfeiture of the property, and that they directed the claimant to give the release bond in the name and style of the partnership as obligors, and that the copartners obtained possession of the cargo and sold the same, and received the proceeds to their own use as copartners. 2. That large sums of money, to wit, $21,963.72, paid for storage, internal revenue, and the charges of the treasury agent, were paid with the funds of the partnership with full knowledge of all the said copartners, as well as counsel fees and the expenses of defending the suit to condemn the property. 3. That the complainants at the time the release bond was executed had no knowledge that these parties were partners, and that neither the partnership nor the partner last named in the bill of complaint have sufficient goods or estate to pay the amount of the decree against the claimant and his sureties.

Service was made, and the respondent executors appeared and demurred to the bill of complaint, and on the same day the other respondent appeared, and he also filed a demurrer to the bill. Continuance followed, and at the next session of the court in the same term the Circuit Court entered a decree sustaining the demurrers and dismissing the bill of complaint. Prompt appeal was taken by the complainants in open court, and they now assign for error that the Circuit Court erred in sustaining the demurrers and in dismissing the bill of complaint.

Equitable relief is claimed by the complainants chiefly upon three grounds, each of which is attempted to be supported upon the theory that they have suffered a loss and that they have

not an adequate and complete remedy at law. Irrespective of the course pursued by counsel in the argument of the cause, the respective grounds of claim will be examined by the court in the following order, as the one best calculated to exhibit the controversy in its true light.

Throughout it may be considered that the complainants admit that they have no remedy at law, but they contend that they are entitled to equitable relief for at least three reasons: 1. Because the property seized as forfeited to the United States has been legally condemned, and that the principal and sureties in the stipulation for value given for the release of the same at the commencement of the proceedings in the admiralty court have become insolvent and unable to pay the amount of the decree recovered by the complainants in the admiralty court. 2. Because the other two partners named in the bill of complaint were each equally interested with the claimant in the property seized and condemned, of which the complainants had no knowledge; and that inasmuch as the property when released went into the possession of the partnership and was sold for the benefit of all the partners, the claim of the complainants is that they are entitled to equitable relief. 3. Because the estate of the deceased partner is liable for the whole decree; and inasmuch as his estate is insufficient to pay all his debts, the United States are entitled to maintain the bill of complaint to secure their preference.

Due seizure of the property was made and due proceedings were instituted in the Admiralty Court for its condemnation; and the allegations of the bill of complaint show that the person named was duly admitted to appear as claimant, and that the Admiralty Court on his motion passed the order that the property should be released upon his giving a bond to the complainants in the sum of $350,000, with good and solvent security, which is the usual order given in such cases.

Proceedings of the kind are usually adopted in all seizures under the revenue and navigation laws, as is well known to every practitioner in such cases. 1 Stat. 696, sect. 89; Rev. Stat. 938. Bond or stipulation with sureties for the discharge of the property seized is allowed in all revenue cases, except for forfeiture, and the better opinion is that even in seizures

for forfeiture the bond may be executed in the same manner by the claimant. Id., sects. 940, 941.

Pursuant to the known and well-recognized practice, the court allowed the claimant to give the bond with sureties approved by the court, and thereupon directed the marshal to surrender the property to the principal in the bond. Beyond all doubt, therefore, the claimant acquired the possession of the property lawfully and in pursuance of the order of the Admiralty Court.

Hearing was subsequently had; and the Admiralty Court entered a decree in the case dismissing the libel, and ordered that the property, consisting of the cargo of the steamboat, be restored to the claimant. Due appeal to the Circuit Court was entered by the libellants; and the record shows that the Circuit Court reversed the decree of the District Court, and adjudged and decreed that the steamboat and her cargo be condemned as forfeited to the United States. No appeal was ever taken from that decree, and the allegations of the bill of complaint also show that the Circuit Court entered a decree against the claimant and his sureties in the release bond or stipulation for value in the sum of $204,982.28 with interest and costs of suit.

Attempt is not made to call in question the jurisdiction of the Admiralty Court, nor of the Circuit Court in the exercise of its appellate power in the case. Nothing can be better settled, said Judge Story, than the proposition that the admiralty may take a fidejussory caution or stipulation in cases *in rem*, and that they may in a summary manner render judgment and award execution to the prevailing party. Jurisdiction to that effect is vested in the District Court, and for the purposes of appeal is also possessed by the circuit courts, both courts in such cases being fully authorized to adopt the process and modes of process belonging to the admiralty, and the district courts have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having jurisdiction of the principal cause, the court must possess the

power over all its incidents, and may by monition, attachment, or execution enforce its decree against all who become parties to the proceedings. *Brig Alligator*, 1 Gall. 145; *Nelson* v. *United States*, Pet. C. C. 235.

Bonds given in such cases, says Dunlap, are to all intents and purposes stipulations in the admiralty, and must be gov erned by the same rules. Original cognizance in such cases is exclusive in the district courts; but the circuit courts, in the exercise of their appellate jurisdiction, possess the same power to the extent necessary in re-examining the orders and decrees of the subordinate court. Dunlap, Prac. 174; *The Peggy*, 4 C. Rob. 389; *The Ann Caroline*, 2 Wall. 558.

Such security was taken for the cargo seized in the District Court, and no review of that order was asked in the Circuit Court. Where an appeal is taken from the decree of the District Court, the *res* if not released, or the bond or stipulation for value, follows the cause into the Circuit Court, where the fruits of the property if not released, or the bond or stipulation for value, may be obtained in the same manner as in the court of original jurisdiction, the bond or stipulation being in fact nothing more than a security taken to enforce the final decree. *McLellan* v. *United States*, 1 Gall. 227.

It matters not, says the same magistrate, whether the security in such a cause be a bond, recognizance, or stipulation, as the court has an inherent right to take it and to proceed to render judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different rule. *The Octavia*, 1 Mas. 150; *The Wanata*, *supra*.

Securities of the kind are taken for the property seized for the value of the same when delivered to the claimant, and the stipulation will not be reduced if the property when sold brings less than the appraised value, nor can the court award any damages against the sureties beyond the amount of the stipulation, even if the amount of the stipulation is less than the decree. *The Hope*, 1 Rob. Adm. 155.

Authorities may be found which deny the power even of the Admiralty Court to recall the property for any purpose after the stipulation for value has been given and the property has been delivered to the claimants. *The Wild Ranger*, Brown &

Lush. 671; *Kalamazoo*, 9 Eng. L. & Eq. 557; s. c. 15 Jur. 885; *The Temiscouta*, 2 Spinks, 211; *The White Squall*, 4 Blatch. 103; *The Thales*, 10 id. 203.

Other decided cases, perhaps for better reason, hold that in case of misrepresentation or fraud, or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, it may be recalled before judgment where the ends of justice require the matter to be reconsidered. *The Hero*, Brown & Lush. 447; *The Union*, 4 Blatch. 90; *The Duchese*, Swabey, 264; *The Flora*, Law Rep. 1 Adm. 45; *The Virgo*, 13 Blatch. 255.

Suppose the power, in case of fraud, misrepresentation, or manifest error in the court, exists in the court of original jurisdiction, or even in the Circuit Court, inasmuch as the stipulation for value follows the appeal into that court, still it is clear that no other court possesses any such jurisdiction nor any power to re-examine the discretionary ruling of the admiralty courts in that regard. *Smart* v. *Wolff*, 3 T. R. 340; *Lord Camden* v. *Home*, 4 id. 382; *The Wanata*, *supra*; *Houseman* v. *The Schooner North Carolina*, 15 Pet. 40.

Even if the rule were otherwise, it would not avail the complainants in this case, as they never made any application either to the District Court or to the Circuit Court to recall the property, nor is it now pretended that the amount of the stip ulation is not fully equal to the value of the cargo released, nor that the sureties were not perfectly solvent at the time the bond was executed. Nothing of the kind is alleged, and of course nothing of the kind is admitted by the demurrer.

Suitors in cases of seizures on waters navigable from the sea by vessels of ten or more tons burthen are saved the right of a common-law remedy where the common law is competent to give it. 1 Stat. 77.

Given as the bond was on the release of the cargo of cotton in a suit *in rem* for its condemnation, it became the substitute for the property; and the remedy of the libellants, in case they prevailed in the suit *in rem* for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized. Common-law remedies in cases of seizure for forfeiture or to enforce a lien

are not competent to effect the object for which the suit is instituted, and consequently the jurisdiction conferred upon the district courts, so far as respects that mode of proceeding, is exclusive. Parties in such cases may proceed *in rem* in the admiralty; and if they elect to pursue their remedy in that mode, they cannot proceed in any other forum, as the jurisdiction of the admiralty courts is exclusive in that mode of proceeding, subject, of course, to appeal to the Circuit Court. *Leon* v. *Galceran*, 11 Wall. 185; *Steamboat Company* v. *Chase*, 16 id. 522; *The Belfast*, 7 id. 624.

Proceedings *in rem* are exclusively cognizable in the admiralty, and the question whether a case is made for the recall of property released under bond or stipulation in such a case must, beyond all doubt, be determined by the courts empowered to hear and determine the matter in controversy in the pending suit. Nor is there any thing unusual in the fact that other parties beside the claimant were interested in the property seized at the time the property was released and the bond for value taken in its place. *In the Matter of William Stover*, 1 Curt. C. C. 201; *The Adeline and Cargo*, 9 Cranch, 244.

Whenever a seizure takes place, it is the right of the owner to appear and file his claim, if he complies with the preliminary order of the court as to costs; but the claim is often made by the master of the vessel or the managing owner, and it may be made by an agent or the consignee, and in the case of a foreign ship it may be filed by the consul of the nation to which the ship belongs. Experience has approved the practice, as the security is rendered sufficient by the sureties; nor is the danger of loss from their insolvency much if any greater than what arises where the property is retained, from liability to decay or to destruction by fire or flood. Admiralty courts everywhere favor the practice, and the same is sanctioned to a very large extent by the acts of Congress. 9 Stat. 81; Rev. Stat., sect. 941.

Many of the preceding observations made to prove that the first ground of claim set up by the complainants cannot be sustained are equally applicable to the second, for the same purpose; but there is another answer to the second, which is

even more conclusive than any thing before remarked to show that the decree of the Circuit Court is correct.

Although the claimant is the sole principal in the bond, yet the allegations in the bill of complaint are that the other two partners were equally interested in the property, and that the claimant procured the release of the property, for the benefit of the copartnership; and the complainants allege that the transaction should be viewed in all respects as if all the members of the firm had been principals in the bond, inasmuch as the property when released went into the possession of the firm and was sold for the benefit of all the partners. Concede what is not admitted, that evidence to prove that theory may be admissible, it is nevertheless true that the theory must be examined in view of the established fact that the Circuit Court entered a final decree on the bond against the principal and sureties for the whole value of the cargo which was seized and condemned, and the bill of complaint alleges that the decree of the Circuit Court is in full force and unreversed.

None of the authorities afford any countenance whatever to the theory that the property released can be recalled for any purpose after the property has been condemned and the libellants have proceeded to final judgment against the principal and sureties in the bond or stipulation for the release of the property seized. Difficulties of the kind, it would seem, must be insuperable; but if they could be overcome, there is still another, which of itself is entirely sufficient to show that the second ground of claim is no better than the first.

Judgment has already been rendered against the claimant, and even admitting that the other two partners may be treated as if they were joint principals in the bond given for the value of the property released, it is quite clear that the judgment against the claimant would be a bar to an action against the other partners upon the bond. Even without satisfaction, a judgment against one of two or more joint contractors is a bar to an action against the others, within the principle of the maxim *transit in rem judicatam*, the cause of action being changed into matter of record. *King* v. *Hoare*, 13 Mee. & W. 494.

Judgment in such a case is a bar to a subsequent action

against the other joint contractors, because the contract being joint and not several, there can be but one recovery. Consequently the plaintiff, if he proceeds against one only of the joint contractors, loses his security against the others, the rule being that by the recovery of the judgment, though against one only, the contract is merged and a higher security substituted for the debt. *Sessions* v. *Johnson*, 95 U. S. 347; *Mason* v. *Eldred*, 6 Wall. 231. From which it follows, if the theory of the complainants is correct that the bond is to be regarded as the joint bond of the three partners, that they are without remedy against the other two, as they have proceeded to final judgment against the claimant.

Neither of the other partners signed the bond but the complainants allege that the firm directed the claimant to give the bond for and in the name and style of their said partnership as obligors; to which it may be answered that if the firm gave such directions the claimant did not follow them, as the bond set forth in the record as an exhibit to the bill of complaint shows that it is the individual bond of the alleged senior partner. Nor do the complainants pretend that the other partners ever signed the instrument, but they contend that the demurrer admits every thing which they have alleged.

Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. *Dillon* v. *Barnard*, 21 Wall. 430; *Ford* v. *Peering*, 1 Ves. Ch. 71; *Lea* v. *Robeson*, 12 Gray (Mass.), 280; *Redmond* v. *Dickerson*, 1 Stockt. (N. J.) 507; *Murray* v. *Clarendon*, Law Rep. 9 Eq. 17; *Nesbitt* v. *Berridge*, 8 Law Times, N. S. 76; Story, Eq. Plead. (7th ed.), sect. 452.

Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding. *Beal-*

ham v. *Drake*, 9 Mee. & W. 78; *Humble* v. *Hunter*, 12 Law Rep. Q. B. 315; *McArdle* v. *The Irish Iodine Company*, 15 Irish C. L. 146; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201.

Mere legal conclusions are never admitted by a demurrer; nor would it benefit the complainants even if it could be held otherwise, as it must be conceded that the theory of the bill of complaint is that the liability of the three partners is a joint liability, and it is equally well settled that a judgment against one in such a case is a bar to a subsequent action against either of the others, as appears from the authorities already cited, to which many more may be added. *Robertson* v. *Smith*, 18 Johns. (N. Y.) 459; *Ward* v. *Johnson*, 13 Mass. 148; *Cowley* v. *Patch*, 120 id. 137; *Smith* v. *Black*, 9 Serg. & R. (Pa.) 142; *Beltzhoover* v. *The Commonwealth*, 1 Watts (Pa.), 126.

Where the contract is joint and several the rule is different, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally; but even in that case the rule is subject to the limitation that if the plaintiff obtains a joint judgment he cannot afterwards sue the parties separately, for the reason that the contract or bond is merged in the judgment, nor can he maintain a joint action after he has recovered judgment against one of the parties, as the prior judgment is a waiver of his right to pursue a joint remedy. *Sessions* v. *Johnson*, *supra*.

Concede that, and still the complainants aver that they did not know, when they obtained their decree against the claimant and his sureties, that the property belonged to the partnership, or that the bond for value was in fact given by the claimant pursuant to the direction of the other partners.

Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an averment of a mistake of law against which there can be no relief in a court of equity. *Hunt* v. *Rousmaniere's Administrators*, 1 Pet. 1.

Courts of equity may compel parties to execute their agreements, but they have no power to make agreements or to alter those which have been understandingly made; and the same rule applies to judgments duly and regularly rendered and in

full force. 1 Story, Eq. (9th ed.), sect. 121; *Bilbie* v. *Lumley*, 2 East, 183.

Fraud is not imputed, nor is it charged that there was any mistake or misrepresentation. Where there is neither accident nor mistake, misrepresentation nor fraud, there is no jurisdiction in equity to afford relief to a party who has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery. *Penny* v. *Martin*, 4 Johns. (N. Y.) Ch. 566; *Anderson* v. *Levan*, 1 Watts & S. (Pa.) 334.

Courts of equity will not grant relief merely upon the ground of accident where the accident has arisen without fault of the other party, if it appears that it might have been avoided by inquiry or due diligence. 1 Story, Eq. (9th ed.), sect. 105.

Ignorance of the facts is often a material allegation, but it is never sufficient to constitute a ground of relief, if it appears that the requisite knowledge might have been obtained by reasonable diligence. Id., sect. 146.

Relief in equity will not be granted merely because a security in an admiralty suit becomes ineffectual, if it appears that it became so without fraud, misrepresentation, or accident, which might have been prevented by due diligence. *Hunt* v. *Rousmanier's Administrators*, 2 Mas. 366; *Sedam* v. *Williams*, 4 McLean, 51.

Having come to the conclusion that the alleged claim of the United States is not well founded, the question of priority becomes wholly immaterial.

Decree affirmed.

MR. JUSTICE BRADLEY dissented.

PLATT v. UNION PACIFIC RAILROAD COMPANY.

1. By the third section of the act of Congress approved July 1, 1862 (12 Stat. 489), incorporating the Union Pacific Railroad Company, lands were granted to the company "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," and it was enacted that all such lands "not sold or disposed of" by the company before the expiration of three years after the completion of the entire road should be subject to settlement and pre-emption, like other lands. Upon a consideration of this and other provisions of the act and of the amendatory act of July 2, 1864 (13 id. 356), — *Held*, 1. That these provisions should be so construed as to effect their primary object, which was to furnish aid in and during the construction of the road, and that it cannot be controlled or defeated by the secondary and subordinate purpose of opening to settlement and pre-emption such of the lands as should not be sold or disposed of within the designated period. 2. That the words "or disposed of" are not redundant, nor are they synonymous with "sold," but they contemplate a use of the lands granted different from the sale of them, and that a mortgage of them is such a use. 3. That the mortgage of them executed by the company April 16, 1867, for the purpose of raising money necessary to continue and complete the construction of the road, disposed of them within the meaning of the act, and was authorized thereby. 4. That the mortgage was an hypothecation of the fee, and not merely of an estate determinable at the expiration of three years from the completion of the road, and the debt it was given to secure not having matured, the lands are not subject to pre-emption. *Sed quære*, whether the remnants that may be unsold when the mortgage debt shall be paid will not then be subject to pre-emption.
2. In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

This was a bill in equity filed Sept. 28, 1878, by William H. Platt, to enjoin the Union Pacific Railroad Company from prosecuting an action of ejectment which it brought against him the twenty-third day of that month, for the recovery of a certain quarter-section of land situate in the county of Hall and State of Nebraska, whereof he was in possession, claiming the equitable title thereto. The company answered. The case was heard upon the pleadings, and the bill dismissed. Platt appealed here.

Platt entered upon the land in the year 1874, and thereafter

remained in possession. He made improvements thereon, and performed all the conditions which entitled him, as a qualified pre-emptor, to a preference right of purchase, if the land were subject to pre-emption. He duly filed, Sept. 21, 1878, his declaratory statement, made the requisite proofs before the proper officers, paid the receiver of the local land-office $200, being at the rate of $1.25 per acre, and took a receipt therefor.

The land is part of an odd-numbered section, situate within ten miles of the road of the company, and is included in the grant made by the act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, &c., approved July 1, 1862 (12 Stat. 489), and the amendatory act of July 2, 1864 (13 Stat. 356). The company accepted the grant, located the route of its road and filed a map thereof within the requisite time, and, in order to raise the means necessary to continue and complete the work on its road which was then constructing, issued, April 16, 1867, its coupon bonds to the amount of $10,400,000, payable twenty days after the date thereof, with semi-annual interest. To secure the payment of them it executed and duly acknowledged a certain indenture of that same date, covering the granted lands, which it caused to be recorded in said Hall County before July 1, 1872. The United States issued a patent, bearing date March 26, 1875, to the company for the granted lands not theretofore conveyed to it.

The company refused to accept the money so paid by Platt to the receiver of the land-office.

The bill and answer set up different dates when the road was completed; the first alleging it to be before July, 1869, and the latter Nov. 14, 1874, when it was finally accepted by the government.

The act of 1862 provides as follows: —

"SECT. 3. And be it further enacted, that there be and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections

per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre to be paid to said company.

"SECT. 4. And be it further enacted, that whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, — the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, — the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road, as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed upon certificate of said commissioners." . . . .

The amendatory act changes the number of sections per mile granted by the third section of the original act from "five" to "ten," and the limits of the grant from "ten" to "twenty," miles on each side of the road; and declares the company to be entitled to patents, upon the construction and acceptance of each "twenty" consecutive miles of road.

The act of 1862 provides that upon the completion of forty consecutive miles (changed to twenty by the act of 1864) of said road, bonds of the United States of $1,000 each, bearing

six per cent semi-annual interest, due at thirty years from date, shall be issued by the Secretary of the Treasury to the company, to the amount of sixteen bonds per mile (a larger amount per mile being allowed between certain designated points); and that "to secure the repayment to the United States, as hereinafter provided, of the amount of the said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds or any part of them when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, this section shall not apply to that part of any road now constructed."

The tenth section of the act of 1864 provides that sect. 5 of the act of 1862 "be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to

which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States. And said section is further amended by striking out the word 'forty' and inserting in lieu thereof the words 'on each and every section of not less than twenty.'"

The indenture executed by the company to secure its bonds conveys in fee to trustees, upon certain trusts, terms, and conditions, the lands granted to it by the acts of Congress. One condition is, "that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of the said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part."

It further provides that the lands shall be under the management and control of the company, to be by it sold or contracted to be sold for such prices and on such terms of payment as shall be mutually agreed upon by the company and the trustees; that the trustees shall, upon payment of the purchase-money of the several tracts which may be sold, receive and apply the same, and the proceeds of all sales made by them of lands so conveyed to them, to the sole and exclusive purpose of the payment of the said coupon bonds, until the same and the whole thereof shall be fully paid and satisfied, and thereafter to reconvey to the company the residue of said lands remaining unsold; that in default of the payment of either the interest or principal of the said coupon bonds, according to the tenor and effect thereof, for the period of six months after demand at the place of payment, the trustees are authorized to enter into and take possession of the lands and foreclose the indenture; that in case of such default for the period of one year, then the principal sum of said bonds is to

become due and payable, and the said trustees are authorized to take possession of the lands, foreclose said indenture by selling, at public auction in the city of Omaha or New York, the lands, or so much thereof as may be necessary to pay and discharge said coupon bonds, or so many thereof as are then outstanding and unpaid; and that in case of any sale upon any such foreclosure, or at any public auction, the trustees are empowered to make, execute, and deliver a conveyance of the lands so sold, which shall convey to the purchaser all the rights and privileges of the company in and to the property so sold, to the same extent as the company shall have previously enjoyed and held the same.

The indenture further declares "that all the provisions of said acts of Congress, so far as they are applicable, are hereby made, and shall be deemed and taken to be, a part of this instrument, and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part are to be observed and strictly and faithfully carried out and fulfilled."

The company has made no sale or disposition of the land in controversy otherwise than by said indenture, and bonds to the amount of $7,000,000 are still outstanding.

Mr. James Lowndes for the appellant.

The Attorney-General for the United States.

The controlling question is, Had the United States the right to sell, in accordance with the provisions of the pre-emption laws and at the minimum price, the tract of land involved in this controversy? In disposing of it, it is not important to determine at which of the dates alleged by the respective parties the road was completed, as, at the time of the appellant's entry, more than three years had elapsed from the date claimed by the company as that when the road was accepted.

No sale or disposition of the land within the meaning of the act has been made by the company. It may be that "dispose of" has not such an exact and universally accepted technical meaning as "sell," "exchange," "mortgage." It popularly signifies "to sell." Webster's definition is, "to exercise finally one's power of control over; to pass over into the control of

some one else; to alienate; to bestow; to part with; to get rid of." Worcester's is, "put out of possession of."

Every one of these definitions points to a transfer of title and ownership as the essential signification of the word. Its usual technical meaning is "to sell." A general devise with power to dispose of carries the fee. 2 Redf. Wills, 334, note. A devise with power of disposition gives power to convey the fee. *Lyon* v. *Marsh*, 116 Mass. 232; *Ellston* v. *Schilling*, 42 N. Y. 79.

It was not the effect nor the intent of the indenture to transfer the title or the ownership of the lands. Its effect must be determined by the law of the State where the lands are situated (*United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23); and in deciding upon it this court conforms to the decisions of the State court. *Hinde* v. *Vattier*, 5 Pet. 398.

The statutes of Nebraska enact that "in the absence of stipulations to the contrary the mortgagor of real estate retains the legal title and right of possession thereof" (Gen. Stat. 1873, sect. 55, p. 881); and not only her courts, but those of the respective States where the granted lands lie, hold that a mortgage conveys no title or right of possession. It merely creates a lien to be enforced by action. *Kyger* v. *Ryley*, 2 Neb. 20; *Chick* v. *Willetts*, 2 Kan. 384; *Waterson* v. *Devoe*, 18 id. 223; *Drake* v. *Root*, 2 Col. 685; *Hyman* v. *Kelly*, 1 Nev. 179; *Johnson* v. *Sherman*, 15 Cal. 287; *Goodnow* v. *Ewer*, 16 id. 461; *Dutton* v. *Warschauer*, 21 id. 609.

The indenture, so far from stipulating that the legal title and right of possession shall not remain in the company, provides that the latter shall have the exclusive control of the lands, and full power and authority to make contracts for the sale of them at such prices as it and the trustees may agree upon. It thus appears that nothing but a lien on the lands was created, which is not a *jus ad rem*, but simply a charge upon them, binding them with no greater force and effect than an ordinary judgment, or an assessment against them for taxes. The company concedes the non-transfer of them. It alleges, in the action of ejectment, that it is the owner, seised in fee of the tract in question and entitled to the possession thereof.

In ascertaining the meaning of the act subjecting the lands to pre-emption, on the failure of the company to sell or dispose of them within a specific period, we may recur to the history of the times, to the surrounding circumstances, the preceding legislation touching the public domain, and to the apprehended mischief which Congress sought to avert. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 723; *Maryland* v. *Railroad Company*, 22 Wall. 105; *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72.

These have been considered by this court in *Railway Company* v. *Prescott*, 16 Wall. 609, and the case shows that the construction for which the company now contends would, if practically carried out, defeat the settled policy of the government, and exclude from pre-emption an immense body of lands, the settlement of which Congress designed to facilitate and expedite.

If creating the lien on the lands is disposing of them, then the company has complied with the requirement of Congress. The extinguishment of the lien by the payment of the debt would not render them subject to settlement under the pre-emption laws.

Counsel may insist that our construction does not give effect to "or." The word does not necessarily imply that the terms between which it is found are alternatives. Worcester remarks that there is no word in the language of more equivocal import. It is often used to connect equivalent expressions. Such is the case here.

The indenture, by providing that the provisions of the act in all that concerns the sale and disposal of the land shall be deemed and taken as a part of the instrument, stipulates, if our construction be correct, that the lands shall, at a given time, be subject to pre-emption at $1.25 per acre. This can work no hardship as the avails of the sales would be paid to the company, and the holders of the bonds purchased them with knowledge of the conditions of the grant.

Platt has met the requirements of the pre-emption laws, and has a complete equitable right to the land. *Frisbie* v. *Whitney*, 9 Wall. 187; *Hutchings* v. *Low*, 15 id. 77; *Shepley et al.* v. *Cowan et al.*, 91 U. S. 330; *Moore* v. *Robbins*, 96 id.

530. He is, therefore, entitled to relief. The failure of the company to sell within the appointed time vested the legal title to the lands in the United States, or if this court holds that such title still abides in the company, then the latter holds it as the trustee of parties entitled to pre-emption under the acts of Congress, and those acts can be executed only by the officers of the government.

Mr. Sidney Bartlett and *Mr. Samuel Shellabarger, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

If it be conceded that the complainant has complied with all the conditions prescribed by the acts of Congress for the acquisition by a pre-emptioner of an equitable title to a portion of the public lands, the question still remains, whether the land which he claims was open to pre-emption when his settlement was made. It is confessedly a part of the lands which the United States granted to the Union Pacific Railroad Company by the act of July 1, 1862. 12 Stat. 489.

The third section [1] of the act contains words of present grant, but the fourth section enacted that on the completion of each successive forty miles of the railroad and telegraph line, patents should be issued, "conveying the right and title to said lands to said company, on each side of the road, as far as the same is completed, to the amount aforesaid." The seventh section required the road and telegraph to be completed before the first day of July, 1874. The amending act of July 2, 1864 (13 Stat. 356), enlarged the grant, but made no change in its terms; and the Secretary of the Interior, as directed by the act, withdrew the lands within fifteen miles of the designated route of the road from pre-emption, private entry, and sale.

Such was the grant. The railroad and telegraph line were entirely completed before July 1, 1874 (if not in 1869), and patents for all the lands granted were directed to be issued to the company in November of that year. By force of the grant, however, and by the definite fixing of the route of the road, and the filing the map thereof in the Interior Department, as required by law, together with the completion of the road westward and beyond the tract claimed by the complainant, the

[1] *Supra*, p. 49

title to that tract had become vested in the company before April 16, 1867. On that day the company, for the purpose of raising money necessary to continue and complete the construction of their road, issued their coupon bonds for the sum in the aggregate of $10,400,000, bearing seven per cent interest, and payable in twenty years from their date. On the same day, for the purpose of securing the payment of the bonds, the company executed a mortgage or deed of trust to trustees of all and several the several sections of land granted to them by the said acts of Congress, including the tract claimed by the complainant. The instrument, we think, though in form a deed of trust, was substantially a mortgage. It was delivered to the trustees, and duly recorded. The bonds were sold in different markets to *bona fide* purchasers, and they are now outstanding, about $7,000,000 still remaining unsatisfied. All this was before the entire road was completed, and before the first step was taken by the complainant to obtain his pre-emption right.

In view of these facts, we are to determine whether the mortgage was a disposition of the lands granted to the company within the meaning of the last clause of sect. 2 of the act of 1862. If it was, the tract of land claimed by the complainant was not open to settlement and pre-emption when he entered thereon, nor has it been at any time since. That clause declared that "all the lands granted by the section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption," &c. Was the mortgage a sale or disposition of the lands as understood by Congress? That the company had power to mortgage the lands admits of no reasonable doubt. It may be conceded that a railroad company has not power either to sell or mortgage its franchise, or perhaps the road which it has been chartered to build, without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purposes the legislature had in view in the grant of the charter. The adventurers who obtain the charter and who accept it undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and with

out legislative consent they cannot throw off the obligation they have assumed. But the reason is inapplicable to a sale or mortgage of property which is not a part of the road and in no way connected with its use. Parting with such property or incumbering it in no degree interferes with the performance of the duties of the company to the public. Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations, or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership, — the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the company by the legislature that granted the charter, without any restriction of their use.

Assuming, therefore, as we must, and as has been tacitly conceded in the argument, that the company had the power to make the mortgage of 1867, we need not stop to inquire whether it was a sale or a partial sale. In some of the States, as well as in England, a mortgage is practically, as well as in form, a sale. It passes the legal title to the mortgagee. The more general modern doctrine in this country is, we admit, that it creates merely a lien, without any transmission of title. But if not a sale, was the mortgage made by the company defendant in this case not a disposition of the lands granted to it by Congress? This question is not to be answered by reference to definitions given in the dictionaries. What did Congress mean in the act of 1862? That something else than sale, either total or partial, was intended we are required by all the rules of construction to conclude. Congress is not to be presumed to have used words for no purpose. If it was intended that only lands which had been sold before three years had expired after the entire completion of the railroad should be exempted from preemption, the words "or disposed of" were entirely superfluous. But the admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In *Commonwealth* v. *Alger* (7 Cush. (Mass.) 58–89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if

practicable, as to give some effect to every part of it. So, in *People* v. *Burns* (5 Mich. 114), it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is *Dearborn and Others* v. *Inhabitants of Brookline* (97 Mass. 466); and in *Gates* v. *Salmon* (35 Cal. 576) it was ruled that no words are to be treated as surplusage or as repetition. The phrase "or disposed of" must, therefore, have some distinctive meaning, some meaning beyond the word "sold." What that is may be seen very plainly when the whole act of 1862 is examined. We are seeking for the intention of Congress, and to discover that we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object. Congress addressed itself to the work of securing a railroad from the Missouri River to the western boundary of the Territory of Nevada, and thence to the Pacific Ocean. The work was vast, beyond the reach of private capital or enterprise. It could be accomplished only by the bestowal upon a corporation of very large governmental aid. The proposed road ran over mountains and through what was known to be an uninhabited desert, for more than a thousand miles. The lands through which it must pass were supposed to be almost worthless, and quite unsalable, until they should be made, by the construction of a railroad, accessible to settlers and to Eastern markets. The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made, the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864 additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now

attempt to portray the earnestness — the all-absorbing earnestness — with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in *United States* v. *Union Pacific Railroad Co.* (91 U. S. 72), to which we refer. Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. We do not say that other incidental considerations were not kept in mind, but what we do assert as plainly manifest in the legislation is, that the paramount intention of Congress was to give such assistance to the company as to induce them to build the road. Every other consideration was subordinate to that.

All will concede that in construing the act of 1862 we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers, "for the purpose of aiding in the construction of the railroad and telegraph line," and securing governmental transportation, &c. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have

been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart. This, we think, was what was intended by the phrase "or disposed of," as distinguished from "sold." Some of the lands might be sold as the work was progressing, and others could be used in aid of the construction only by pledging them to persons who might be willing to advance money on the faith of their prospective value. But whether sold or used as a security for money loaned to advance the construction of the road, they were equally employed for the purpose for which they were granted. The words "disposed of" are undeniably apt words to indicate a transfer by mortgage. If land be conveyed to A. to enable him to raise money for a particular purpose, nobody would doubt that a mortgage would be a disposition of the land for that purpose; and the grant made by the third section of the act of 1862 was obviously made, as we have suggested, with the intent of giving present assistance to the company in the construction of the road. It was not intended to be available only after the company had raised all the money necessary for the work. Then the time of need for the purpose mentioned would have gone by. The act declares it to have been "to aid in the construction of the road," not to reimburse expenditures made in the construction. Hence it must have been intended that the company might use or dispose of the land in some other way than by a sale. But in what other way? Not by gift; for that would not have been in aid of the construction, and the grant was intended for that. Nor by leases. They could have brought little money. And no other mode of disposition except by mortgage has been suggested which could furnish the requisite aid for building the road. No other is conceivable. The conclusion would seem, therefore, to be almost inevitable, that Congress, when speaking of a disposition of the lands other than a sale, contemplated making them available for the purposes of the grant by mortgage.

And if so, it is hard to believe that only a limited interest in the lands was allowed to be hypothecated. Twelve years were designated as the period within which the road was required to be completed, and lands not sold or disposed of within three

years thereafter were to be open to pre-emption. Moreover, under the provisions of the act, the title to the lands could be perfected in the company only as the work of construction advanced; that is, as each section of forty miles was completed. The company might not become entitled to some until July 1, 1874. If, therefore, a mortgage could only bind the lands unsold until the expiration of three years after that date, it would have been an hypothecation for a term of years, and as to some of the lands, for a term of only three years. Was that the aid proffered by Congress to stimulate and render possible the completion of an enterprise in which it felt so deep an interest? If so, it was a barren gift. Looking at the character of the lands and their remoteness from settlements, it must have been evident enough that money could not have been raised on the credit of such a mortgage. The power of disposition given for the express purpose of enabling the company to raise money for the construction of the road, by such an interpretation of the act is made of no value. The interpretation, therefore, defeats the manifest intention of Congress, and for that reason it cannot be accepted.

If it be suggested, as it has been on behalf of the complainant, that the mortgage contains a provision that has some bearing upon the extent of its lien, it may be well here to notice that provision. The instrument purports to convey to the trustees a fee, and not a limited estate, and it requires in all sales that may be made under it the conveyance of a fee. It contains, however, the following clause: "It is hereby declared by the parties to this indenture that all the provisions of the said acts of Congress [referring to the acts of 1862 and 1864], so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument, and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part are to be observed and strictly and faithfully carried out and fulfilled."

What are thus stipulated to be observed and strictly and faithfully to be carried out and fulfilled are the provisions of the acts in all that concerns the sale and disposal of the lands. They are matters to be carried out and strictly fulfilled, — duties

to be performed by the company, and duties which concern the sale or disposal of the lands. Carrying out and performing a provision implies action, and the provision must, therefore, be one relating to action. But the acts of Congress contain no provision respecting the sale or disposal of the lands that requires action, that is, something to be carried out and fulfilled, except the implied duty of devoting the proceeds of sales or dispositions strictly and faithfully to aid in the construction of the road.

The provision that at the expiration of three years from the completion of the road the unsold or undisposed-of lands should be open to pre-emption, was in its nature not one to be "strictly and faithfully carried out and fulfilled" by the company. The right to pre-emption of whatever might be left for pre-emption was a matter with which the company had nothing to do, — in relation to which they had no duties to perform, and only a right to the price paid by the pre-emptor. The clause of the mortgage referred to seems, therefore, to have been intended only as a stipulation on the part of the company that whatever money was raised on the mortgage should be strictly and faithfully applied in furtherance of the purpose for which the grant of the lands was made; namely, to aid in the construction of the railroad. Thus understod, it was a valuable stipulation for the mortgagees. It added to their security; for the value of the lands depended principally upon the application by the company of all its means to the completion of the work.

On the other hand, if an hypothecation of the lands in fee was within the power to "dispose of" them, as we have endeavored to show, and if the granting part of the mortgage made, standing by itself, did hypothecate a fee, it is hard to believe the parties intended by the stipulations referred to to restrict the exercise of the power to the grant of an estate for years, a limitation alike injurious to the mortgagors and the mortgagees. We think, therefore, nothing in the stipulation is repugnant to the granting part of the mortgage which purported an hypothecation of the entire fee.

There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We

may now think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad have shed new light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. Guided by this rule of construction, as well as by others universally recognized, we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed by this company in 1867 was a disposition of the lands granted by the third section of the act of 1862, within the meaning of that act.

We do not say that any mortgage, however small, or manifestly made to evade a *bona fide* execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers, and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. It may be conceded it would not be, for it would be in conflict with the avowed object of the grant. The present is no such case. By the pleadings it appears that the mortgage of 1867 was made "for the purpose of raising money necessary to continue and complete the construction of the railroad, in accordance with the act of Congress." Nor are we now called upon to decide whether the lands covered by the mortgage will not be open for pre-emption, if they shall remain unsold after the mortgage shall be extinguished. That question is not now before us.

The principal objection urged against the interpretation we have given to the words "sold or disposed of" is, that it is repugnant to the governmental policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and pre-emption, at a price not

exceeding $1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant. No limitation was set to the quantity of land which the company might sell to single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no pre-emptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it. If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company, to be used for the completion of the road, as this work progressed, any secondary policy the government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and pre-emption. This appears to us to have been what was intended, and all that was intended. The construction gives full effect alike to the paramount and the subordinate purposes of the act. Each has its own field of operation. The construction contended for by the appellant restricts the power of disposition, denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. On the other hand, utilizing the lands, by raising money upon them through a mortgage, or, in other words, disposing of them by mortgage, did not defeat the policy of opening the remnants not used to pre-emption.

Thus construing the last clause of the third section of the

act, in connection with all the other provisions made by Congress, endeavoring to give effect to every part, and regarding the spirit as well as the letter, we are constrained to hold that the mortgage of 1867 was a disposition of the lands mortgaged within the meaning of the statute, and, consequently, that the tract of land claimed by the complainant was not open to pre-emption when he undertook to pre-empt it. He has, therefore, no equitable title to it.

Decree affirmed.

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE CLIFFORD and MR. JUSTICE MILLER, dissenting.

I dissent from the judgment of the court in this case. In the third section of the original charter, after granting to the company five alternate sections of public land on each side of its line of railroad, to aid in the construction thereof, it was provided that all lands so granted, which should not be sold or disposed of by the company within three years after the entire road should have been completed, should be subject to settlement and pre-emption, like other lands, at a price not exceeding $1.25 per acre, to be paid to the company. The appellant, after the three years had expired, settled upon the land in question and claimed pre-emption of the same; and offered to the company the price specified in the statute. The latter refused to receive the money or to recognize his right, alleging that it had disposed of the lands in 1867 by executing a mortgage for its entire land grant to secure a loan of $7,000,000. The question is, whether such mortgage is a sale or disposition of the lands within the meaning of the proviso of the third section. I think it is not. In my judgment, Congress had in view such a sale and disposition of the lands as would secure a settlement thereof. The object was to encourage a speedy settlement of the country along the line of the road; and hence it was provided, if the company did not so dispose of them, they should be open to settlers, at the usual prices, reserving to the company, however, the right to receive the purchase-money for the same. If the company, by one sweeping deed of trust, or mortgage, could cover the whole domain as with a blanket, and thus prevent a settlement thereon until

the lands, by advance of prices, would be out of the reach of actual settlers desirous of occupying and improving them, it seems to me it would entirely defeat the objects of the act.

It is said, however, that if the company could not mortgage the lands they could not make use of them in aid of the construction of the road, the purpose for which they were expressly granted. I do not think this result would by any means follow. The fourth section provides for granting to the company patents for a proportionate part of the lands, for every forty miles of railroad which should be completed. As fast, therefore, as the successive forty-mile sections should be completed, it was contemplated by the act that the company should have control of the lands to that extent. This would constantly subject to their use large tracts, which, if disposed of, according to the intent of Congress, would have effected a rapid settlement of the adjacent country in all portions of the route which were adapted to cultivation.

The criticism that the words "sold or disposed of" mean something more than "sold," and can only mean a mortgage of the lands, I do not conceive to be just, but rather as sticking in the bark. Reading the whole act together, I think the only fair construction is that which is above suggested.

The objection that the right of pre-emption contended for would have prevented the company from giving a mortgage at all is not tenable. The mortgagees take the mortgage subject to the provisions of the act. It contains a proviso to this express effect. The lands were mortgaged *cum onere*, and the mortgagees, if so stipulated, would be entitled to the purchase-money receivable from settlers. This view of the subject would effectuate justice between all the parties, preserve the true construction of the act, and carry out the policy of Congress.

In view of these considerations, I think that the decree should be reversed, and that the appellant, the complainant below, should be declared to be equitably entitled to the land in question.

LANGE v. BENEDICT.

This court having in *Ex parte Lange* (18 Wall. 163) held that the judgment against him, rendered Nov. 8, 1873, was not authorized by law, he brought an action against the judge who pronounced it. The court below decided that even though the judgment was unauthorized, the defendant having, in pronouncing it, acted in his judicial capacity, and it not being so entirely in excess of his jurisdiction as to make it the arbitrary and unlawful act of a private person, was not liable in damages. *Held*, that such decision does not present a Federal question.

MOTION to dismiss a writ of error to the Court of Appeals of the State of New York.

This action was brought by Edward Lange in the Supreme Court of the State of New York, to recover damages for his alleged unlawful imprisonment by Charles L. Benedict, District Judge of the United States for the Eastern District of New York, who as such, by virtue of an act of Congress, held the Circuit Court of the United States for the Southern District of New York at the October Term thereof, 1873.

At that term, so held by said Benedict, Lange was tried upon an indictment consisting of twelve counts; some of them charging him with having feloniously stolen certain mail-bags in use by the Post-Office Department; others with having, for lucre and gain, feloniously appropriated certain other such mail-bags; and others with having knowingly and unlawfully, for lucre and gain, conveyed away certain other such mail-bags, to the hindrance and detriment of the public service. The indictment was found under sect. 290 of the act of June 8, 1872 (17 Stat. 320), which provides that the prisoner, on conviction of the offence, if the value of the property be less than $25, shall be imprisoned not more than one year, *or* be fined not less than ten nor more than $200. The jury found Lange guilty, and the value of the property to be less than $25. The court during the term sentenced him, November 3, to be imprisoned for the term of one year *and* to pay a fine of $200. On the following day there was paid into the registry of the court $200, in full satisfaction of the fine imposed by the sentence; and on the 7th of that month the clerk of the court deposited it at the office of

the Assistant Treasurer in New York City, to the credit of the Treasurer of the United States. On the same day a writ of *habeas corpus* was granted in favor of Lange, returnable the ensuing day, and during the same term of the court he was produced in obedience to the writ, whereupon, after hearing, the court, on November 8, vacated and set aside the sentence pronounced against him on the third day of that month, and, proceeding to pass judgment anew, resentenced him to be imprisoned for the term of one year.

On the seventeenth day of December, an order for a rule returnable before said Circuit Court, to show cause why a writ of *habeas corpus* should not issue, was granted by Judge Woodruff. On the 24th of that month the rule was discharged. Thereupon a writ of *habeas corpus* was issued by Judge Blatchford, returnable December 29 before Judge Benedict. The latter, upon the return-day, ordered that the prisoner be remanded and the writ dismissed.

On the 13th of January, 1874, writs of *habeas corpus* and *certiorari* were granted by this court, and it subsequently adjudged that the sentence pronounced on the 8th of November, 1873, under which Lange was then held a prisoner, had been pronounced without authority. It was thereupon ordered and directed that he be discharged.

The imprisonment complained of was that suffered by Lange from the time of the second sentence until his discharge.

To the complaint, which set up the foregoing matters, the defendant demurred, upon the ground that it appeared on its face that: 1. The court had no jurisdiction of the person of the defendant. 2. The court had no jurisdiction of the subject of the action. 3. The complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled at the special term of the Supreme Court, but the judgment was reversed at the general term. Lange appealed to the Court of Appeals, where the judgment at the general term was affirmed and the complaint dismissed. He thereupon sued out this writ of error.

Mr. B. F. Tracy for the defendant in error, in support of the motion.

I. It would be a work of supererogation to cite authorities in

support of the settled doctrine, that, in order to give this court jurisdiction to re-examine the judgment of a State court, it must appear affirmatively from the record that a Federal question was necessarily involved in the determination of the matter in controversy. *a.* It is quite manifest that the Court of Appeals may have disposed of the whole case by holding that the act complained of was a judicial act, and, for that reason, entailed no liability upon the judge. *b.* That the court decided no Federal question is shown by its opinion incorporated in the record. This court, in some instances, looks to the opinion below, for the purpose of ascertaining whether, in point of fact, a Federal question was decided. *McManus* v. *O'Sullivan*, 91 U. S. 578. *c.* The Supreme Court, at general term, decided: 1. That the act complained of was lawful, because authorized by the decision of this court in *Basset* v. *United States*, 9 Wall. 38. 2. That, whether lawful or not, it was a judicial act, for which no liability was incurred. The Court of Appeals limited its action to determining the last question upon grounds of public policy and general law, without reference to any principle of Federal jurisprudence.

II. Even if there had been drawn in question the validity of an authority exercised under the United States, or the defendant had claimed an immunity under a commission derived from such authority, the decision, to give this court jurisdiction, must have been against such authority or such immunity. Rev Stat. 709.

Mr. William H. Arnoux, contra.

I. The judgment of this court in *Ex parte Lange* (18 Wall. 163) is *in rem*, and conclusive upon every one to the extent it was made. This action is based upon it precisely as a creditor's bill is based upon a preceding judgment.

If full faith and credit are not given to that judgment, — which means that, if whenever it comes in question complete effect is by construction withheld from it, — this court can review, and has jurisdiction.

The imprisonment for which Lange seeks redress was under the second judgment, which this court declared to be void. It was without authority of law, and beyond the scope of the defendant's official power. It was, therefore, a trespass. A

subordinate court, by declaring it to be a judicial act, has practically disregarded the decision of this court, and refused to acknowledge its binding effect.

II. Any case that draws in question the power of a United States officer raises a Federal question.

In regard to the jurisdiction of this court, it cannot be material whether the defendant had no judicial power whatever, or none to render the judgment which has been held void. In either case, it raises the question whether, so far as that act is concerned, he was not a judge, but a trespasser.

This is properly a question for determination here, and cannot have a valid ultimate decision from any other tribunal.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *Ex parte Lange* (18 Wall. 168) we decided that the present plaintiff in error must be discharged from imprisonment, because the sentence under which he was held was not authorized by law. In the present case, the Court of Appeals of New York held that even though such was the law the defendant in error is not liable in damages for the false imprisonment, because in pronouncing the judgment under which the imprisonment was had he acted as a judge, in his judicial capacity, and not so entirely in excess of his jurisdiction as to make it the arbitrary and unlawful act of a private person. This is not a Federal question, and it was the only question decided.

The writ must, therefore, be dismissed for want of jurisdiction; and it is

So ordered

DOGGETT v. RAILROAD COMPANY.

1. Where, under the act of the State of Florida entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," passed Jan. 6, 1855, a railroad was sold by the trustees of the internal improvement fund, who applied the proceeds of the sale to the purchase and cancellation of a part of the outstanding bonds of the company, — *Held*, that the purchaser of the road is thereafter required to pay, on account of the sinking-fund for which that act provides, one-half of one per cent semi-annually upon the remaining bonds, and not upon the entire amount originally issued by the company.
2. Where the receiver of the internal improvement fund who was appointed by the court filed a bill in equity to determine upon what amount of said bonds the purchaser was bound to make such semi-annual payment, — *Held*, that the holders of them were not proper parties complainant.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

This is a bill in equity filed by Francis Vose, a citizen of New York, William H. Wagner, a citizen of South Carolina, and Aristides Doggett, who was appointed a receiver of the internal improvement fund of Florida by the court below, against the Florida Land Company, to compel the company, in accordance with the provisions of an act of the State of Florida, entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," passed Jan. 6, 1855, to pay said Doggett, as such receiver, one-half of one per cent on the entire amount of bonds issued by the company.

Certain lands and the proceeds thereof were set apart by said act, and constituted said fund. It was irrevocably vested in certain State officers and their successors in office, to hold the same in trust for the uses and purposes in said act mentioned, with power to sell and transfer the lands, receive payment therefor, to invest surplus moneys arising therefrom in stocks of the United States or of the several States, or in the internal improvement bonds issued under the provisions of the act, and also to so invest the surplus interest arising from said investments, and to pay out of said fund the interest from time to time as it might become due on the bonds issued by the different railroad companies under the authority of the act, and with further power to receive and demand semi-annually,

after each separate line of railroad should be completed, the sum of one-half of one per cent on the entire amount of bonds issued by such company, as a sinking-fund for the payment of said bonds as they should become due.

The Florida Railroad Company was chartered by the legislature of Florida. It accepted the provisions of the act and issued its bonds.

The third section of the act is as follows: —

"SECT. 3. Be it further enacted, that all bonds issued by any railroad company under the provisions of this act shall be recorded in the comptroller's office, and so certified by the comptroller, and shall be countersigned by the State treasurer, and shall contain a certificate on the part of the trustees of the internal improvement fund that said bonds are issued agreeably to the provisions of this act, and that the internal improvement fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds. All bonds issued by any railroad company under the provisions of this act shall be a first lien or mortgage on the road-bed, iron, equipment, workshops, depots, and franchise; and upon a failure on the part of any railroad company accepting the provisions of this act to provide the interest as herein provided on the bonds issued by said company, and the sum of one per cent per annum as a sinking-fund, as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder either for cash or additional approved security, as they may think most advantageous for the interest of the internal improvement fund and the bondholders. The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking-fund: *Provided*, that in making such sale it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent semi-annually to the sinking-fund, until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase, and the forfeiture of the purchase-money paid in."

The remaining sections of the act bearing upon the questions involved are set out in the opinion of the court.

The bill of complaint charges that on Nov. 3, 1870, said Vose

filed his bill in that court against Reed and others, trustees of said fund, alleging that he was the owner of first-mortgage bonds of the company issued under the provisions of said act; that the company having failed to provide the interest and the sum of one-half of one per cent per annum on the entire amount of its bonds, and been so in default for about three years, the trustees took the road into their possession, and sold it for $323,400 to one Dickerson and his associates, subject to all the provisions of the act, and, among others, to those of its second and third sections; that the trustees, in accordance with sect. 3, determined to apply the amount received from the sale to the purchase and cancellation of outstanding bonds of the company, and not to incorporate the same with the sinking-fund provided by the act for the full discharge of the bonds and interest, and by said application all of the outstanding bonds of the company were purchased and cancelled, except two hundred and twenty-eight, of which said Vose owned one hundred and ninety-five, and said Wagner twelve.

It then states that said bill of complaint filed by said Vose charges the trustees with acts of nonfeasance and malfeasance, among others, in failing to demand from the present owners of the railroad the sum of one-half of one per cent on the entire amount of bonds issued by said railroad company; that the change in the corporate name of the company in no wise affected its title or removed its liabilities; and that the property is held subject to the conditions and terms of sale, and to the payment of said sum of one-half of one per cent.

The bill then sets up the decree appointing said Doggett receiver of all the moneys and securities belonging to said trust fund, in the hands of the trustees, and giving him power to sue for and collect the same; and alleges that at a final hearing a decree was rendered directing that he be continued as receiver, and conferring power upon him to sue for and receive all moneys now due or which might thereafter become due to said internal improvement fund; that he has demanded from the trustees all the money due to said fund from the purchasers of said road; that the trustees have wholly failed to pay it, at times claiming that the purchasers have paid all that can be justly claimed of them under the sale, and at other times that the purchasers should only be called upon to pay one-half of

one per cent semi-annually on the two hundred and twenty-eight bonds actually outstanding. The bill alleges that sects. 2 and 3 of the act required the purchasers of the road to continue the payment of the one-half of one per cent semi-annually on the entire amount of the bonds issued by the company, and it prays, among other things, that the company may be adjudged and decreed to be liable to pay accordingly.

The company demurred to the bill for want of equity and for misjoinder of parties complainant. The demurrer was sustained and the bill dismissed. Doggett then appealed to this court.

The case was argued by *Mr. Theron G. Strong* and *Mr. William A. Maury* for the appellant, and by *Mr. William M. Merrick* for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a case in equity. The bill was filed by Doggett, as a receiver appointed in another case in the same circuit court whence this case came, and by Vose and Wagner, as co-complainants with him. The defendant demurred upon the grounds, among others, that the bill does not make a case that entitles the complainants to any relief, and that there is a fatal misjoinder of parties with respect to Vose and Wagner. The Circuit Court sustained the demurrer and dismissed the bill. Doggett thereupon removed the case to this court by appeal. With respect to the merits, the case presents but a single question; that is, whether the appellee is bound to pay Doggett, as the receiver of the internal improvement fund of Florida, the one-half of one per cent, semi-annually, upon the entire amount of the bonds issued by the company, or only to make such payment upon the amount of such bonds as are still outstanding. The bonds were issued pursuant to an act of the legislature of Florida, entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," passed Jan. 6, 1855. The road was sold, and the proceeds applied, as far as they would go, to the extinguishment of the bonds. The whole number issued was one thousand five hundred and eighteen, of $1,000 each. Twelve hundred and ninety have been retired. Two hundred and twenty-eight are still unredeemed and outstanding.

The determination of the question before us depends upon the construction and effect of the second, third, and twelfth sections of the act before mentioned.

The second section, after making the governor and other designated officers of the State trustees of the internal improvement fund, proceeds to define their powers and duties. They are empowered "to receive and demand semi-annually the sum of one-half of one per cent (after each separate railroad is completed) on the entire amount of the bonds issued by said railroad company, and invest the same in the stocks of the United States or State securities, or in the bonds herein provided to be issued by said company."

The third section provides that the bonds shall contain "a certificate on the part of the trustees of the internal improvement fund that said bonds are issued agreeably to the provisions of this act, and that the internal improvement fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds." Provision is then made for the seizure and sale of the road in default of payment as required. The section thus concludes: "The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking-fund: *Provided*, that in making such sale it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent semi-annually to the sinking-fund until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase and the forfeiture of the purchase-money paid in."

Under these provisions the road was sold and the proceeds applied, as before stated.

The twelfth section is as follows: —

"Every railroad company accepting the provisions of this act shall, after the completion of the road, pay to the trustees of the internal improvement fund at least one-half of one per cent on the amount of indebtedness on bond account, every six months, as a sinking-fund, to be invested by them in the class of securities named in sect. 2, or to be applied to the purchase of the outstanding bonds of the company; but it shall be distinctly understood that

the purchase of said bonds shall not relieve the company from paying the interest on the same, they being held by the trustees as an investment on account of the sinking-fund."

By the proviso in the third section it is declared that after a sale the payment of the semi-annual half per cent shall continue "until all the outstanding bonds are discharged." It is clear that it was to continue no longer. Before the sale, if the trustees should purchase the bonds as an investment for the sinking-fund the company was to continue to pay the interest upon them. This was right and reasonable. After the sale and the discharge of a part of the bonds by the proceeds of the sale, as occurred here, there is no provision for the payment of any interest. It would be wrong as to the bonds discharged by means derived from the company, and absurd as to all other bonds, — the company being deprived of all means of payment by the loss of their road. Hence, after the sale, the exaction is only that the semi-annual half per cent shall be paid, and that by the purchasers of the road; and it is expressly declared by the twelfth section that it shall be "on the amount of indebtedness on bond account." This is the requirement, and it goes no further. Upon what ground, then, can the purchasers be required to pay any thing more? There is no warrant for such a demand in the letter, meaning, or reason of the statute. The primary requirement is that the payment shall be made upon all the bonds issued, and to cease when they are all discharged. The extent of the burden assumed by the State was graduated as to each road by the total amount of its bonds. Why should not the burden of the company be diminished in the same ratio with the burden of the State? The former is to cease wholly when all the bonds are discharged. Why should it not be lessened in the exact proportion that the amount of the outstanding bonds is reduced? The contrary, we think, cannot be supported. As well might a creditor, where payments at different times have been made by the debtor, demand interest upon the whole amount of the original debt until the last dollar is paid. This, in effect, is the case made by the bill. But there is a short and conclusive answer to the claim. It is, that the twelfth section constituted a contract with the purchasers of the road. That contract was that

they should pay "on the amount of indebtedness on bond account." This was made a condition of the sale; and they so agreed, and they agreed to nothing else. This contract is binding upon both parties, and cannot be changed without their mutual consent. The language of the act is too clear to admit of doubt. In a statute "where the intent is plain, nothing is left to construction." *United States* v. *Fisher*, 2 Cranch, 386.

There is no complaint that payment upon the bonds outstanding has not been regularly made.

We have no doubt as to the merits of the bill. We think the objection of misjoinder was also well taken. The case was purely ancillary in its character. The receiver represented the court which appointed him and the trustees of the internal improvement fund. Vose and Wagner claimed to own a part of the outstanding bonds. But that gave them no standing place in the litigation. As well might every other holder of any of the bonds, however small the amount, or how numerous such holders might be, have been made co-complainants with the receiver, as Vose and Wagner. The presence of the latter as such parties was unwarranted, and if permitted, and the suit had gone on, would have incumbered the record unnecessarily and have led to confusion.

The demurrer was properly sustained.

Decree affirmed.

TRANSPORTATION LINE v. COOPER.

A canal-boat laden with coal for transportation, having on board the master, with his family, is not a "barge carrying passengers," within the meaning of sect. 4492 of the Revised Statutes, which requires that such a barge, while in tow of a steamer, shall be provided with "fire-buckets, axes, life-preservers, and yawls."

ERROR to the Supreme Court of the State of New York.

This suit was brought under the provisions of the statute of New York, in the Supreme Court of that State, by Hobart Cooper, as administrator of his wife, to recover damages for her death, caused by a collision in the port of New York,

between a schooner, which was in tow of the tug "J. N. Parker," and a canal-boat loaded with coal, whereof he was master, having on board his wife and children, and which with other boats was in tow of the steam-tug "U. S. Grant." The Eastern Transportation Line owning one tug, and J. J. Austin the other, were the defendants. Cooper, in the court below, had a judgment against them. The Eastern Transportation Line alone appealed to the general term. The judgment was affirmed there, and subsequently on appeal by the Court of Appeals. This writ of error was then sued out.

One of the errors assigned is that the court charged the jury that "there is no law requiring that a canal-boat which is not used for the purpose of transporting passengers should be provided with life-preservers or life-boats, or any paraphernalia of that kind." The other errors are grounded upon exceptions to the charge, which relate to questions not arising under any act of Congress.

The defendant in error moved to dismiss the writ for want of jurisdiction, and united therewith, under the amended sixth rule, a motion to affirm the judgment below.

Mr. William Stanley in support of the motion.
Mr. R. D. Benedict, contra.

MR. CHIEF JUSTICE WAITE announced the judgment of the court.

The only Federal question presented in this case is one upon which we are not inclined to hear an argument. A canal-boat laden with coal for transportation, having on board the wife and children of the captain, is not "a barge carrying passengers," within the meaning of sect. 4492, Rev. Stat., which requires such a barge, while in tow of a steamer, to be provided with "fire-buckets, axes, life-preservers, and yawls." The motion to dismiss is denied, but that to affirm is granted.

Judgment affirmed.

BARROW v. HUNTON.

1. A. having recovered a judgment against B. and C. in the District Court for the parish of New Orleans, B., on the ground among others that the judgment, having been obtained by default and without lawful service upon him, was void, filed a petition in that court praying for a decree of nullity and for an injunction. An injunction and citation were issued and served upon A., who thereupon, alleging that he was a citizen of Missouri and B. a citizen of Louisiana, prayed that the action of nullity be removed to the Circuit Court of the United States. It having been so removed, and B.'s petition amended by converting it into a bill so as to conform to the practice in equity, that court, on a final hearing upon the pleadings and proofs, the latter including an exemplification of the record and proceedings in the original suit, dissolved the injunction and dismissed the bill. *Held*, that the causes relied on for the nullity of the judgment being, under the Code of Louisiana, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the Circuit Court could not take cognizance thereof.
2. The character of cases sought to be removed to the courts of the United States is always open to examination, to determine whether, *ratione materiæ*, they are competent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

On the 19th of January, 1874, Logan Hunton recovered in the Fourth District Court for the parish of Orleans, Louisiana, against F. M. Goodrich and one Pilcher, a judgment for $2,500, and interest at eight per cent per annum from May 1, 1861. On the 28th of that month, Goodrich filed a petition in said court, praying for a decree of nullity of the said judgment, and for an injunction in the mean time, setting forth as grounds for such relief that the judgment complained of was void, because it was founded on a default taken, and no lawful service of the petition and citation in the suit had ever been made on him, Goodrich; and because the partnership of Pilcher & Goodrich had been dissolved before 1866; and because he, Goodrich, had been discharged as a bankrupt in 1868. An injunction and citation were thereupon issued and served.

On Feb. 8, 1874, Hunton, the defendant in this proceeding, filed a petition for the removal of the action of nullity to the Circuit Court of the United States, alleging that he was a citizen of Missouri, and that Goodrich, the plaintiff, was a citizen

of Louisiana; and after a hearing on the subject, an order of removal was made by the District Court. The plaintiff moved the Circuit Court of the United States to remand the cause; but this motion was denied, and the suit proceeded in the latter court. After various proceedings had, the plaintiff, by leave of the court, amended his petition to conform to the equity practice of the United States court, converting it into a bill in equity containing substantially the same averments, and praying the same relief as before. The defendant answered, and the parties went to proofs. Amongst the proofs adduced was an exemplification of the record and proceedings in the original suit in which the judgment was rendered, which the plaintiff in this suit sought to have declared null and void. On the 14th of February, 1876, the Circuit Court made a final decree, as follows: "This cause came on to be heard upon the bill, answer, replication, and proofs, and was argued by counsel. On consideration whereof, it is ordered, adjudged, and decreed that the injunction herein issued by the State court was wrongfully obtained, and is therefore dissolved. And it is further ordered and decreed that the plaintiff's bill be dismissed at his costs."

A rehearing having been refused, the decree was confirmed on the 28th of February, 1876.

From this decree the present appeal was taken; and it is sought to be reversed on two grounds, upon which errors are assigned, namely: —

1st, That the transfer was illegally made, and the Circuit Court was without jurisdiction.

2d, That it appears that the Fourth District Court, which rendered the judgment against F. M. Goodrich, was without jurisdiction, and therefore the judgment is null and void.

Goodrich having died *pendente lite*, Barrow, his administrator, was substituted in his stead.

Mr. George L. Bright for the appellant.

The Circuit Court had no jurisdiction of a suit seeking to annul the judgment of the State court, or to enjoin the execution thereof, and the transfer of the suit was made without authority of law. *Bank* v. *Turnbull & Co.*, 16 Wall. 190; *Gwin* v. *Breedlove*, 2 How. 29; *Freeman* v. *Howe*, 24 id. 460; *Dunn*

v. *Clarke*, 8 Pet. 1; *Williams* v. *Bryne*, Hempst. 472; *Brooks* v. *Montgomery*, 23 La. Ann. 450; *Diggs* v. *Walcott*, 4 Cranch, 179; *Peck* v. *Jermes*, 7 How. 623; *Watson* v. *Jones*, 13 Wall. 719; *Dial et al.* v. *Reynolds et al.*, 96 U. S. 340; *Ranlett* v. *The Collier White Lead Co.*, 30 La. Ann. 56; *Goodrich* v. *Hunton*, 29 id. 372; 2 Story, Const., sects. 1757, 1759; 1 Kent, Com., sect. 19, p. 451; Act 1793, 1 Stat. 334; Rev. Stat., sect. 720.

Mr. Thomas J. Durant, contra.

The question of the legality of the removal of the case to the Circuit Court cannot be first raised here. The appellant did not object to the jurisdiction of that court, but filed his bill, which was ultimately dismissed upon the merits. He ought not to be allowed to take his chances there, and, on an adverse decision, assign for error that the removal was unauthorized.

He now seems to consider that the Circuit Court was without jurisdiction of the cause, although it appears by the record that the complainant was a citizen of Louisiana, and the defendant, of Missouri. There was, therefore, no want of jurisdiction, *ratione personarum.*

But it is urged that the Circuit Court could not annul the judgment of the State court, and enjoin its execution.

It is perhaps a sufficient answer to this proposition to say, that the Circuit Court neither annulled nor enjoined that judgment. It is true that the appellant insisted before the lower court that it ought to do so; but the court refused so to grant the relief prayed for in his bill.

All the authorities, therefore, which have been cited in support of the first assignment of error, if they have any application, must sustain the action below.

MR. JUSTICE BRADLEY, after stating the facts, delivered the opinion of the court.

The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the

proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible.

On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes* (92 U. S. 10), the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.

It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the common-law practice, it would have been a motion to set aside the judgment for irregularity, or a writ of error *coram vobis*.

It will be more satisfactory, however, to take a brief view of the practice of Louisiana on this subject.

The process for procuring nullity of a judgment in that State is prescribed by the Code of Practice, in which we find the following provisions: —

"ART. 556. Definitive judgments may be revised, set aside, or reversed: 1, by a new trial; 2, by appeal; 3, by action of nullity; 4, by rescission. The last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them."

"ART. 605. The causes for which the nullity of a definitive judgment may be demanded are twofold: those that are relative to the form of proceeding, and those that appertain to the merits of the question to be tried."

Art. 606 specifies the vices of form for which a judgment can be annulled; as, when against a minor appearing without a curator, or against a married woman appearing without the authority of her husband; where the defendant is condemned by default without being cited; where the judge was incompetent to try the suit; and where defendant has not been legally cited, and has not entered appearance, and judgment is by default.

Art. 607 specifies the grounds of nullity relating to the merits; namely, where the judgment has been obtained through fraud, bribery, forgery of documents, &c.

"ART. 608. The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken, pursuant to the provisions hereafter expressed.

"ART. 609. The nullity can be demanded on the appeal, only while the appeal is still pending, and when the nullity is apparent on the face of the records.

"ART. 610. The party praying for the nullity of a judgment before the court which has rendered the same must bring his action by means of a petition; and the adverse party must be cited to appear, as in ordinary suits."

From these extracts it is to be inferred that the action of nullity must be brought in the same court which rendered the judgment, or in the court of appeal when an appeal is pending. And so the Supreme Court of Louisiana has decided. Hennen's Digest, art. Judgment, XI. (c), and cases there cited. In *David, Adm'r*, v. *Calouret* (1 La. Ann. 171) the court says: "The settlement made before the notary, under the order of the judge, . . . sought to be annulled in this suit, was made the judgment of the court by a decree, . . . and before that court alone ought the action to annul the act to have been brought." The action of rescission, which is nearly identical with that of nullity, is expressly required by art. 616 of the

Code of Practice to be brought in the court that rendered the judgment.

The fact that an action of nullity can only be brought in the court which rendered the judgment, or in the court to which such judgment is appealed, is entitled to some weight in determining the question now under consideration. It shows that in the estimation of the legislature of Louisiana there is a manifest propriety in submitting the question of the validity of a judgment to the court which rendered it, or to the court which has the right to revise the judgment by way of appeal. We are not disposed, however, to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the courts of the United States. If the State legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.

The classification of the causes of nullity in the Louisiana Code into causes relative to form and those relative to the merits is nearly coincident with the classification above suggested, of cases which are, and cases which are not, cognizable in the courts of the United States. Causes of nullity relating to form would fall in that class of cases which could not be brought in these courts, or be removed thereto. The present case is one of that character. It is precisely described in the fourth division of art. 606 of the Code.

In our judgment, therefore, the case was one of which the Circuit Court could not take cognizance; and therefore the judgment must be reversed, and the record remitted with directions to remand the cause to the State court from which it was removed.

So ordered.

HACKETT v. OTTAWA.

1. *Semble*, that the borrowing of money by a city for the development of its natural resources for manufacturing purposes is within the provision of the Illinois Constitution of 1848, that corporate authorities may be empowered "to assess and collect taxes for corporate purposes," as interpreted by the Supreme Court of the State.
2. If a city issues bonds under its corporate seal, and in accordance with its charter, which empowers the council, with the sanction of a majority of voters attending an election for the purpose, to borrow money generally and to issue bonds therefor, and the bonds recite upon their face that they are issued in accordance with certain ordinances of the city, the titles of which, being quoted alone in the bonds, characterize the ordinances as providing for a loan for municipal purposes, the city is estopped, in a suit upon the bonds by an innocent purchaser for value, to set up that the ordinances appropriated the money to other purposes, and that the bonds were, therefore, void.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action is upon certain bonds issued by the city of Ottawa, Ill., in the year 1869, and of which the testator of plaintiffs in error became the holder and owner, for value, before maturity. They are in the usual form of municipal bonds, and, besides pledging the faith of the city irrevocably for their payment, contain these recitals: —

"This is one of one hundred and twenty bonds of like amount and even date herewith, numbered one to one hundred and twenty respectively, issued by the city of Ottawa, by virtue of the charter of said city; wherein it is provided that the city council shall have power to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than ten per cent per annum. Art. 5, sect. 8.

"No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election for that purpose. Art. 10, sect. 20. And also in accordance with a certain ordinance passed by the city council of said city on the fifteenth day of June, A.D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the

qualified voters of said city at an election holden on the twentieth day of July, A.D. 1869, and in conformity with an ordinance passed by the city council of said city on the thirtieth day of July 1869, entitled 'An ordinance to carry into effect the ordinance of June 15, 1869, entitled an ordinance to provide for a loan for municipal purposes.'

"Witness the signatures of the mayor and clerk of said city, and the corporate seal thereof, this twentieth day of August, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL] "HENRY A. SCHULER, *Mayor.*
"R. N. WATERMAN, *Clerk.*"

The defendant below filed two special pleas. The first, after setting forth the ordinance of June 15, 1869, and also that of July 30, 1869, and what is alleged to be the substantial privileges granted to the Ottawa Manufacturing Company, by an act of the General Assemby of Feb. 15, 1851, and an act amendatory thereof, passed Feb. 16, 1865, avers that the first act and the amendatory act were the same franchises and powers referred to in the ordinance passed July 30, 1869, as having been granted for that purpose by the legislature of the State of Illinois, under which one Cushman was authorized and directed to expend the proceeds of the bonds aforesaid; that the manufacturing company was a private corporation, not connected with or controlled by the city, and that the bonds were issued and delivered to Cushman as a donation to him, or to the company, to aid in the prosecution of a private enterprise, and were not issued for any municipal purpose whatever; that their issue was without authority of law, and that they are void.

The second plea is in all respects like the first, except it avers that Cushman has failed to comply with his contract, as provided by the ordinance of July 30, 1869.

To each of these pleas a general demurrer was filed by the plaintiffs, which was overruled by the court below; and they having elected to stand by the demurrer, judgment was rendered for the city. The plaintiffs then sued out this writ of error.

The ordinances of the city and the acts of the General Assembly of Illinois referred to in the pleas are substantially set forth in the opinion of the court.

The Illinois Constitution of 1848 declares that "the corporate

authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." Art. 9, sect. 5.

The charter of the city of Ottawa, granted in 1853, confers upon its council the power to establish hospitals; provide the city with water; open, widen, extend, and otherwise improve and repair streets and other public highways; establish, erect, and keep in repair bridges; erect market-houses; provide all needful public buildings for the use of the city; and grants various other municipal powers, the exercise of which neces sarily involves the raising and disbursement of large sums of money. Laws of Ill., 1853, p. 296.

Among the powers expressly delegated to the council is the power "to appropriate money and provide for the payment of the debts and expenses of the city," and, with the sanction of a majority of voters attending at an election for that purpose, "to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof."

Mr. Frank W. Hackett and *Mr. G. S. Eldredge* for the plaintiffs in error.

The language of the charter, "to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof," conferred upon the corporate authorities power as ample to negotiate the bonds in this suit as if a legislative enactment had specially provided for their issue. *Gelpcke* v. *Dubuque*, 1 Wall. 220; *Meyer* v. *The City of Muscatine*, id. 384; *Rogers* v. *Burlington*, 3 id. 654; *Mitchell* v. *Burlington*, 4 id. 270.

A power to borrow money and issue bonds therefor includes the right to make a donation. *Chicago, &c. Railroad Co.* v. *Smith*, 62 Ill. 268; *Railroad Company* v. *County of Otoe*, 16 Wall. 667.

The issue of the bonds in suit was not in violation of sect. 5, art. 9, of the Constitution of Illinois of 1848. *Taylor* v. *Thompson*, 42 Ill. 11; *Burr* v. *City of Carbondale*, 76 id. 455; *Briscoe* v. *Allison*, 48 id. 291; *Johnson* v. *Campbell*, 49 id. 316; *Misner* v. *Bullard*, 43 id. 470; *Chicago, &c. Railroad Co.* v *Smith*, *supra*.

The power conferred by that section gives the unquestionable right to the city to borrow money for any "corporate purpose," within the meaning of the Constitution.

Power to issue bonds for public purposes being lodged in the corporate authorities, and they having put upon the market negotiable securities which purport on their face to have been issued by a city that had charter authority to issue bonds for municipal purposes, the defendant is estopped from setting up that in point of fact the purpose was not municipal, when the bonds themselves recite that the loan is for municipal purposes, and they have come into the hands of a *bona fide* purchaser, who took them relying on such recitals, and without actual notice of the purpose for which they had been issued other than as disclosed on the face of the bonds. *Commissioners of Knox County* v. *Aspinwall et al.*, 21 How. 539; *Bissell et al.* v. *City of Jeffersonville*, 24 id. 287; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Mercer County* v. *Hackett*, id. 83; *Supervisors* v. *Schenck*, 5 id. 772; *Grand Chute* v. *Winegar*, 15 id. 355; *St. Joseph Township* v. *Rogers*, 16 id. 644; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *County of Moultrie* v. *Savings Bank*, id. 631; *Marcy* v. *Township of Oswego*, id. 637; *Humboldt Township* v. *Long et al.*, id. 642; *Commissioners, &c.* v. *January*, 94 id. 202; *Commissioners, &c.* v. *Bolles*, id. 104; *Cromwell* v. *County of Sac*, 96 id. 51; *San Antonio* v. *Mehaffy*, id. 312; *County of Warren* v. *Marcy*, 97 id. 96; *Mealey* v. *St. Clair County*, 8 Dill. 163; *Allen* v. *Cameron*, id. 175; *Wyatt* v. *City of Green Bay*, 1 Biss. 292.

Mr. C. B. Lawrence, contra.

In the absence of express legislative authority, the city could not issue the bonds in suit. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Township of Coloma* v. *Eaves*, 92 id. 484; *Pendleton County* v. *Amy*, 13 Wall. 297; *Kennicott* v. *The Supervisors*, 16 id. 452; *St. Joseph Township* v. *Rogers*, id. 644; *Bissell* v. *City of Kankakee*, 64 Ill. 251; *City of Galena* v. *Corwith*, 48 id. 423; *Trustees, &c.* v. *McConnel*, 12 id. 138; *Marshall County* v. *Cook*, 38 id. 44; *Schuyler County* v. *The People*, 25 id. 181; *Supervisors, &c.* v. *Clark*, 27 id. 305; *Rogers* v. *Burlington*, 3 Wall. 654; *Mitchell* v. *Burlington*, 4 id. 270.

Even if express authority had been given by legislative enactment to the city to issue the bonds as a donation to the Ottawa Manufacturing Company, such enactment would have been void under the Constitution of Illinois. *Loan Association* v. *Topeka*, 20 Wall. 655; *Harward* v. *St. Clair Drainage Co.*, 51 Ill. 133; *The People* v. *Salomon*, id. 48; *The People ex rel. McCagg* v. *The Mayor, &c. of Chicago*, id. 17; *The People* v. *Dupuyt*, 71 id. 651; *Johnson* v. *Campbell*, 49 id. 317; *Madison County* v. *The People*, 58 id. 468.

The bonds in suit were not issued for a corporate purpose. *Loan Association* v. *Topeka*, 20 Wall. 655; *Board of Supervisors* v. *Werder*, 64 Ill. 427; *Bissell* v. *City of Kankakee*, id. 251.

There is no question in this case of innocent purchasers of negotiable paper, for two reasons: first, the bonds were issued without statutory authority, and for a purpose for which such authority would have been unavailing; and, second, the bonds showed this defect on their face. *Township of East Oakland* v. *Skinner*, 94 U. S. 255; *Township of South Ottawa* v. *Perkins*, id. 260; *McClure* v. *Township of Oxford*, id. 429; *Marsh* v. *Fulton County*, 10 Wall. 676.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bonds in suit upon their face import: 1st, That the faith of the city is irrevocably pledged for their payment. 2d, That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion.

The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city, — all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

The ordinance of June 15, 1869, authorizes the mayor to

borrow, in the name, for the use, and upon the bonds of the city, the sum of $60,000, "to be expended in developing the natural advantages of the city for manufacturing purposes," and provides "that no application shall be made of the proceeds of the said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city." It further provides that a sufficient sum to pay interest on the loan should be annually provided by taxation, and set apart as a separate fund, to be applied solely to the payment of the interest on the bonds. That ordinance was ratified at an election held on the 20th of July, 1869, by a majority of all the legal voters of the city. The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, "to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity." It provided that Cushman should execute and deliver to the mayor his obligation that he would, without unreasonable delay, and by proper appliances, bring into use all the available water of the two rivers at Ottawa, as fast as it might be required for actual use, and as fast as it could be leased at fair and reasonable rates, — "the intent of this ordinance being to secure the improvement and development of said water-power in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or *pro rata* so far as said water-power shall be made available for practical use." The ordinance of July 30, 1869, further provided that Cushman should bind himself to return the bonds, and save the city harmless from all loss if the work should not be constructed.

The city avers that the franchises and powers referred to in

the ordinance of July 30, 1869, were those granted to the Ottawa Manufacturing Company by an act approved Feb. 15, 1851, and by an act amendatory thereof, approved Feb. 16, 1865. The first act created certain persons therein named a corporation under the style of "The Ottawa Manufacturing Company," with authority to erect a dam across Fox River at a designated point, "for the purpose of creating a water-power," and to "use, lease, or otherwise dispose of the same, and construct such other works, buildings, and machinery as may be deemed necessary or proper to use such water-power to promote the interests and objects of the company." The second act conferred the additional right to build a dam across the Illinois River, and to construct races so as to introduce the water into the pool of the dam authorized to be erected across the Fox River. And for all the purposes indicated in the original and amendatory act the company was authorized to "take and use such portion of any highway, street, alley, or public ground as may be deemed necessary." But neither of the ordinances, it will be observed, designates, by name, that or any other private company. Nor is it distinctly alleged by the city, nor asserted in argument, that the testator of the plaintiffs understood the ordinances as referring to that company, or that he read them or had any actual knowledge of their terms at the time of his purchase. If the council intended the general public and, particularly, purchasers of its bonds to know that the proposed development of the natural advantages of the city for manufacturing purposes was to be made under the franchises and powers, or for the benefit, of that or any other private corporation, common fairness required that it should have so declared in the ordinances, and thereby distinctly informed all who should examine them, of what it now avows was its real purpose; namely, by a simple donation to give aid to a particular private corporation, established for business ends exclusively. If, by reason of the general reference, in the bonds, to the two ordinances of June and July, 1869, the purchaser is chargeable with notice of their provisions (a proposition to be hereafter examined), the utmost which the city, in view of the indefinite language of the ordinances, can claim is that he had notice that the bonds were issued for the

purpose of "developing the natural resources of the city for manufacturing purposes." Nothing more. This brings us to a question which counsel have discussed with some elaboration in their printed arguments.

We have seen that the charter of the city confers upon the council power to borrow money, upon the credit of the city, and to issue bonds therefor. No limitation is prescribed as to the amount which may be borrowed. Nor is any express restriction imposed as to the objects or purposes for which bonds may be issued. It is clear, therefore, that the council, having secured the assent of the requisite majority of voters, might rightfully borrow money upon bonds of the city for every purpose which could fairly be deemed municipal or corporate. But the specific contention of the city is that the development of the natural resources of the city for manufacturing purposes is not, upon principle or within the meaning of the Illinois Constitution of 1848, a corporate purpose. After a careful examination of the decisions of the Supreme Court of Illinois to which our attention has been called, we find this question by no means free from difficulty. The leading case, *Taylor* v. *Thompson* (42 Ill. 9), involved the question whether a tax levied, under the authority of an act of the legislature, passed in 1865, upon the property of a township, to pay bounties to persons who should thereafter enlist or be drafted into the army of the United States, was for a corporate purpose, within the meaning of the State Constitution. The person who complained of the tax, in that case, was a non-resident of the township, but he owned taxable property within its limits. The Supreme Court of Illinois, through Judge Lawrence, in an opinion of marked ability, sustained the validity of the tax, defining the phrase "corporate purposes" to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." It is suggested, by learned counsel for the city, that that and similar decisions, rendered during the late civil war, were exceptional, and were made almost *ex necessitate*, because the courts were unwilling to cripple the power of the government to raise troops by denying to counties, cities, and towns the right to offer bounties when authorized by the legislature. An answer to this

suggestion is found in the fact that the same court reaffirmed the doctrine of *Taylor* v. *Thompson* in the cases of *Briscoe et al.* v. *Allison et al.*, 43 id. 293; *Misner* v. *Bullard*, id. 470 and *Johnson* v. *Campbell*, 49 id. 317. In the subsequent case of *Chicago, &c. Railroad Co.* v. *Smith* (62 id. 268), decided in 1871, the court, referring to the definition of corporate purpose as given in *Taylor* v. *Thompson*, announced their acceptance of it. In *People* v. *Dupuyt* (71 id. 651) the same definition was referred to without disapproval. The court, declaring that it had gone far enough in upholding that tax, said: "It may be difficult to determine with precision what is a corporate purpose, in the sense of the Constitution, but it is less difficult to determine what is not such a purpose. The true doctrine is, such purposes, and such only, as are germane to the objects of the welfare of the municipality, at least such as have a legitimate connection with these objects, and a manifest relation thereto." Again, in *Burr* v. *The City of Carbondale* (76 id. 455), the court sustained a tax imposed by the city in support of the Southern Illinois Normal University, to which the people of that city had voted a tax, and, referring to *Taylor* v. *Thompson*, said that a corporate purpose was there "held to mean a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it. But in that case a vote of the people authorizing the tax was first to be taken, and the people in fact voted the tax. This was an important fact in determining that case. We thought it difficult to determine with precision what was a 'corporate purpose,' in the sense of the Constitution, but came to the conclusion that it was such a purpose, and such only, as might have a legitimate connection with objects and purposes promotive of the welfare of the municipality, and a manifest relation thereto."

In view of the course of decisions in Illinois, we should hesitate to declare that money borrowed by the City of Ottawa and expended in developing its natural resources for manufacturing purposes, was not, in the sense of the Illinois Constitution of 1848, as interpreted by the Supreme Court of that State, expended "to promote the general prosperity and welfare of the municipality."

But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defence. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances "providing for a loan for municipal purposes." Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited

only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors* v. *Schenck*, 5 Wall. 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defence. What this court declared, through Mr. Justice Campbell, in *Zabriskie* v. *Cleveland, Columbus, & Cincinnati Railroad Co. et al.* (23 How. 381), as to a private corporation, and repeated, through Mr. Justice Clifford, in *Bissell et al.* v. *City of Jeffersonville* (24 id. 287), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

What we have said disposes of the second plea filed by the city. As to the third plea, it is scarcely necessary to say that it does not present a defence to the action. The questions raised by that plea have not been alluded to or discussed in the printed arguments of counsel.

The judgment will be reversed, with directions to sustain the demurrer to the second and third pleas, and for such further proceedings as may be consistent with this opinion; and it is

So ordered.

CANAL AND BANKING COMPANY v. NEW ORLEANS.

In assessing the taxes for the city of New Orleans for the year 1876, a bank there located, with a nominal capital of $1,000,000, was assessed, in addition to its real estate, for the sum of $700,000, as its capital, or money at interest. It refused to pay the assessment, alleging that its capital, not invested in real estate, consisted of legal-tender notes of the United States. *Held*, that the bank, on whom was the burden of proof, having failed by its own statement (*infra* p. 98), or otherwise, to make good its allegation, the assessment does not invade its rights under the Constitution or the laws of the United States.

ERROR to the Supreme Court of the State of Louisiana.

The facts are stated in the opinion of the court.

Mr. John Finney for the plaintiff in error.

Mr. Samuel P. Blanc, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a writ of error to the Supreme Court of Louisiana, brought to reverse a judgment of that court, affirming the judgment of the Superior District Court for the Parish of Orleans. The judgment of the latter court, which was thus affirmed, was a judgment for $10,500, and interest, being for taxes alleged to be due from the New Orleans Canal and Banking Company, the plaintiffs in error, to the city of New Orleans. In assessing the taxes of the city for the year 1876, the bank had been assessed, in addition to its real estate, for the sum of $700,000, as its capital, or money at interest; and the rate of assessment being one and a half per cent, the tax amounted to $10,500. This the bank refused to pay, on the ground that its capital, not invested in real estate, consisted of United States legal-tender notes. Whether this was so or not was the question in the cause; for it was not contended, on the part of the city, that it would be lawful to tax United States securities in the hands of the bank. The question, therefore, was really one of fact; but as the bank alleges that, under pretence of deciding the question of fact, the State courts have really sustained a taxation of its legal-tender notes, it becomes our duty to examine the case.

It seems, from a statement which was admitted in evidence, that from Feb. 1, 1875, to July 1, 1875, the period during which the assessment roll was made up, the bank did, in fact, have on

hand an amount of currency in the form of legal-tender notes, varying from $1,500,000 to $762,000; the latter being the amount on hand on the 30th of June, 1875; but there was no proof in the cause to establish the fact that these notes constituted the capital of the bank, any more than that any other equal portion of its assets constituted such capital.

The nominal capital of the bank was $1,000,000, and estimating its real estate at $200,000, the assessment was still $100,000 less than the balance of the nominal capital; and it was conceded that the bank had a large amount of assets independent of the currency in its possession. By a statement put into the case by the bank, with consent of counsel, it appeared that on the 28th of June, 1875, its affairs stood as follows: —

ASSETS.

Real estate		$182,516.85
Stocks		8,228.35
Taxes paid		14,431.65
Suspended debts		54,740.80
Foreign and domestic bills protested		26,949.73
Notes and bills discounted		1,833,146.41
Foreign and domestic exchange		919,996.51
Interest due on loans on call		3,349.47
City seven per cent gold bonds ($50,000)		25,750.00
Cash items:		
Gold	$32,419.80	
Legal tenders	974,777.17	
Checks sent to clearing-house	172,409.73	
		1,179,606.70
		$4,248,716.47

LIABILITIES.

Capital stock	$1,000,000.00	
Profit and loss	99,694.00	
Dividends unpaid	46,556.00	
Individual depositors	3,044,957.19	
Foreign banks and bankers	48,061.78	
Circulation	9,447.50	
		$4,248,716.47

An inspection of this statement shows that the bank had over $4,000,000 of assets, and that the assets were sufficient to

pay all its debts, and leave enough balance to return to the stockholders all their capital. Now, does it lie with the bank to put its finger on a particular item of the assets, — its money on hand, for example (which appears to have consisted of legal tenders), — and say that this item, and no other item, constituted its capital at that time? Does this depend on the mere option of the bank? Why was not its cash on hand just as applicable to its deposits and other obligations as to its capital? Not a particle of proof was offered, and it is difficult to see how any proof could have been offered, to show that the cash exclusively constituted the capital.

The bank had probably been in operation for years. It is to be presumed that its original capital, not invested in real estate, had been loaned out to its customers, and was rather represented by its discounted bills than by the cash in its drawer. Can it be pretended that the cash on hand was the simple and only representative of that capital? Suppose that this cash had come to the bank from its depositors, — and it is not shown to the contrary, — would it be admissible then to say that it constituted the capital? In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The decision of the assessor must stand, unless it can be affirmatively controverted.

We cannot perceive that the judgment of the Supreme Court of Louisiana invades any right of the plaintiff in error secured to it by the Constitution or laws of the United States, and, therefore, it must be affirmed.

Judgment affirmed.

GRAFTON v. CUMMINGS.

In order to satisfy the requirements of the Statute of Frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands which is signed by the party to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof.

ERROR to the Circuit Court of the United States for the Southern District of New York.

On the sixteenth day of May, 1871, the hotel known as the Glen House, at the foot of the White Mountains in New Hampshire, together with its furniture, was bid off at an auction sale by Grafton at the price of $90,000. At the end of the ten days allowed by the terms of the sale for examination of the title, three deeds were tendered him which were supposed to convey the title. He refused to accept them, or pay the purchase-money, or otherwise complete the contract of purchase. The property was again advertised for sale, and sold for $61,000; and the present suit was brought against him to recover the difference in the amounts for which the property sold at these two sales, as damages for failure to perform the first contract.

The Statute of Frauds of New Hampshire is in these words: "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." The agreement given in evidence on the trial by Cummings, the sole plaintiff, consisted of a paper writing signed by Grafton, certain printed matter on the margin of that writing, and the advertisement mentioned in the writing so signed. They are as follows: —

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction Tuesday, May 16, 1871, at 11 o'clock A.M., and for the sum

of $90,000, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"JOSEPH GRAFTON."

Upon the margin of said agreement were written and printed the following: —

"TERMS OF SALE.

"Ten days will be allowed to examine the title, within which time the property must be settled for. Five thousand dollars will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase-money to be paid Sept. 1, 1871, the remaining balance to be paid Sept. 1, 1872.

"The property is sold subject to the conditions of the sale of the stage-route, stages, &c., which are, that the proprietors of the route shall have the exclusive business of the house."

The advertisement referred to in the foregoing paper as being thereunto affixed was as follows: —

"GLEN HOUSE AT AUCTION.

"The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill, and out-buildings, will be sold at public auction at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock A.M.

"May 2, 1871.

"VALUABLE HOTEL PROPERTY FOR SALE.

"The favorite summer resort known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered), all the out-buildings, stables, and mill on the same, also the furniture, staging, mountain carriages, horses, &c. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the 1st of May, will be sold at public auction to close the estate of the late J. M. Thompson.

Notice of the time and place of sale will be given hereafter. Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Me."

The bill of exceptions adds, that when this paper was put in evidence it was indorsed "A. R. Walker, auctioneer and agent for both parties." It was not fully shown when this indorsement was made, and there was some evidence that it was not there at the time when the deeds which Grafton refused to accept were tendered. The court, however, instructed the jury, that if it was done at any time before the commencement of this action it was sufficient.

Evidence was admitted to show that at the time of the sale another paper was read by the auctioneer affecting the terms of the sale, but it was not among the papers subscribed by defendant.

The following letter was, notwithstanding the objection of the defendant, read in evidence by the plaintiff: —

"DEAR SIR, — I came up to-day hoping to confer with you in regard to the purchase of the Glen House. I don't know but what Lindsay and Barron intend to take it. Some things they said indicated as much, and Grafton offered to let them take it at his bid, and let them have their own time to pay him his claim. But I find Mrs. Thompson is strongly attached to the place. The judge of the Probate Court will make her an allowance. It occurred to me that the purchase might be made in this way. One-tenth would be $9,000: —

S. H. Cummings, $\frac{3}{10}$	$27,000
Lindsay, $\frac{3}{10}$	27,000
Barron, $\frac{3}{10}$	27,000
Mrs. Thompson, $\frac{1}{10}$	9,000
	$90,000

"This would relieve you from most of the care. It would give Mrs. Thompson an interest in it. The $9,000 due Grafton is as much as her share, and I will agree to let it be until she has time to pay it from the profits. I go home to-morrow, but I wanted to propose this to you, as Grafton really don't want any thing to do with the property, though he thinks Stearns, or some one of their

leading hotel men, may have some young man that they would like to put into the house. He will try to dispose of it in that way, but hopes that before doing it I shall be able to write to him that it will be taken up here.

"Very truly yours,

"WOODBURY DAVIS.

"S. H. CUMMINGS, Esq."

There was a judgment for the plaintiff, whereupon Grafton sued out this writ of error.

Mr. A. J. Vanderpoel and *Mr. James W. Gerard* for the plaintiff in error.

The action cannot be maintained. No vendor is named in the paper relied on as the agreement. It is therefore invalid on its face. *Sherburne et al.* v. *Shaw*, 1 N. H. 157; *Boyce* v. *Green*, Batt. 608; *Williams* v. *Lake*, 2 El. & El. 849; *Williams* v. *Byrnes*, 9 Jur. N. S. 863; *Potter* v. *Duffield*, Law Rep. 18 Eq. 4; *Champion* v. *Plummer*, 1 New Rep. 252; *Wain* v. *Warlters*, 5 East, 10.

The indorsement by the auctioneer, in which no vendor is named, did not make the agreement sufficient under the Statute of Frauds. *Potter* v. *Duffield*, *supra*; *Rossiter* v. *Miller*, 48 L. J. N. S. 17; Browne, Stat. Frauds, sect. 374.

In the matters put in evidence, the only agreement of Grafton which, if any, the jury could consider was that signed by him, referring to the terms and conditions of sale. The connection between it and some other paper not so signed by him cannot be shown by parol evidence, but must appear by internal evidence derived from the signed memorandum itself. The declarations of the auctioneer were not admissible. *Johnson* v. *Miller*, 35 N. J. L. 344; *Boydell* v. *Drummond*, 11 East, 142; *Coles* v. *Trecothick*, 9 Ves. 250; *Clunan* v. *Cooke*, 1 Sch. & Lef. 22; *Parkhurst* v. *Van Cortlandt*, 1 Johns. (N. Y.) Ch. 273; *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; *First Baptist Church* v. *Bigelow*, 16 Wend. (N. Y.) 28; *O'Donnell* v. *Leeman*, 43 Me. 158; *Knox* v. *King*, 36 Ala. 367; 1 Smith, Lead. Cas. 465, notes to *Birckmyr* v. *Darnell*.

No support to the argument of Cummings can be derived from *Beckwith* v. *Talbot*, 95 U. S. 289.

Conditions of sale read before the biddings commenced,

but not annexed to the catalogue on which the purchasers' names were entered, nor referred to therein, cannot supply the terms of sale omitted in the catalogue. *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Scofield*, 2 Barn. & Cress. 945. Nor, where the signed memorandum contains no reference to them, are handbills and newspaper notices admissible, although published at the time of sale and there circulated. *O'Donnell* v. *Leeman*, *supra*; *First Baptist Church* v. *Bigelow*, *supra*; *Wright* v. *Weeks*, 25 N. Y. 153; *Riley* v. *Farnsworth*, 116 Mass. 223.

Cummings claims that the declarations of the auctioneer were admissible, because he is the agent of seller and purchaser, so that his acts and declarations are competent. He is not the agent of the purchaser until the premises are struck down, and his agency is limited to then and there signing the contract.

A contract, as originally entered into, cannot at law be altered by evidence of a parol variation in favor of either the plaintiff or the defendent. Dart, Vend. and P. 451; Sugden, Vend. and P. 171; *Goss* v. *Nugent*, 2 Nev. & M. 33; *Blood* v. *Goodrich*, 9 Wend. (N. Y.) 68; *Sanderson* v. *Graves*, Law Rep. 10 Eq. 284.

A parol waiver of the whole contract is sometimes allowed, but never where the effect of the waiver is to substitute a new contract for the original one. *Goss* v. *Nugent*, 5 Barn. & Adol. 58; *Sanderson* v. *Graves*, *supra*.

Mr. Thomas H. Hubbard and *Mr. Henry Heywood*, *contra*.

There was a sufficient memorandum of the contract in writing to satisfy the requirements of the Statute of Frauds. *Walker* v. *Whitehand*, 16 Wall. 314; Browne, Stat. Frauds, sect. 373; *Allen* v. *Bennett*, 3 Taunt. 169; *Beckwith* v. *Talbot*, 95 U. S. 289. The objection that the memorandum which Grafton signed does not show who was the vendor, is answered by the letter written to Cummings by Davis, and also by the printed advertisement pasted to, and thus forming a part of, the memorandum. It is, in substance, a statement that Cummings was prepared to treat with purchasers, and to give them all desired information about the property. It thus designated him either as the seller, or the agent of the seller. Either designation complies with the statute. No formality is requisite in this respect. The memorandum is sufficient, if, in addition to the signature

of the party to be charged, it appear with reasonable certainty who the other party is, and parol evidence is admissible to show that the person whose name appears on the memorandum acted as agent for one of the contracting parties. *Gowen* v. *Klous*, 101 Mass. 449; Browne, Stat. Frauds, sect. 373; *Dykers* v. *Townsend*, 24 N. Y. 57; *Salmon Falls Manufacturing Co.* v. *Goddard*, 14 How. 446.

The indorsement written upon the memorandum sufficiently indicates the other contracting party; and the auctioneer who made it being the agent of both parties at the time of the sale, and of the seller afterwards until the duties of his agency were accomplished, he could bind them by his signature. *Mews* v. *Carr*, 1 Hurlst. & Nor. 484; *Kenworthy* v. *Schofield*, 2 Barn. & Cress. 945; *Rice* v. *Grove*, 22 Pick. (Mass.) 158; *Lerned* v. *Wannemacher*, 9 Allen (Mass.), 412; *Learned* v. *Jones*, id. 419; *Williams* v. *Bacon*, 2 Gray (Mass.), 387; *Coddington* v. *Goddard*, 16 id. 436; *Sanborn* v. *Chamberlin*, 101 Mass. 416; *Gowen* v. *Klouse*, id. 449; *Hunter* v. *Geddings*, 97 id. 41; *Sievewright* v. *Archibald*, 1 Langdell, Select Cases, 452; 17 Q. B. 103; Browne, Stat. Frauds, sects. 352 *a*, 353, 353 *a*, 364, 369.

The memorandum consists of all writings connected, physically, or by distinct reference made in one to the other. Browne, Stat. Frauds, sects. 346–349; *Salmon Falls Manufacturing Co.* v. *Goddard*, *supra*.

Inasmuch as it was a memorandum, and not the contract itself, parol evidence was admissible to show that as put in evidence it conformed to the contract and expressed its essential terms. *Sievewright* v. *Archibald*, 17 Q. B. 103; *Parton* v. *Crofts*, 33 Law Jour. 189; *McLean* v. *Nicoll*, 7 Jur. N. S. 999; *Lerned* v. *Wannemacher*, *supra*; 1 Langdell, Select Cases, 1032 *et seq.*, and cases there cited.

Parol evidence was also admissible, to the same extent that it would have been to explain ambiguities, to identify the subject-matter to which the writing referred; to show the situation of the parties at the time the writing was made, and the circumstances under which the parties executed it. Benjamin, Sales, 156, 157; Browne, Stat. Frauds, sects. 409, 409 *a*; *Blossom* v. *Griffin*, 13 N. Y. 569; *Springsteen* v. *Samson*, 32 id. 703.

Somewhat greater latitude than is permitted in the case of written contracts should be allowed in proving by parol the details of such a contract as this, since the memorandum is required to contain only the essential elements, and not every individual incident in the contract. *McLean* v. *Nicoll*, *supra*; *Salmon Falls Manufacturing Co.* v. *Goddard*, *supra*; *Linsley* v. *Tibbals*, 40 Conn. 522.

MR. JUSTICE MILLER, after stating the facts, delivered the opinion of the court.

The bill of exceptions in this case is voluminous, containing, apparently, every thing said and done on the trial. Sixty-one errors are assigned to this court.

We shall confine ourselves to the examination of one of them. That one presents the question, as it occurs in various forms in the record, whether there was a sufficient memorandum of the contract in writing, under the Statute of Frauds of New Hampshire, to sustain the action.

It is proper to observe that the objection to the papers is not that they were not signed by Grafton, the party charged, for he signed himself the principal instrument. The reference to the others, and their annexation to that, are sufficient to make them a part of the paper which he did sign. We shall, also, for the purpose of this inquiry, take it that Walker was the auctioneer, and that his name indorsed on the instrument gives it all the value which it could have if signed at any time necessary for that purpose.

The distinct objection to the instrument, as so presented, is that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony.

The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the

thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and deliver the consideration for the price so paid.

There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on his part would bind the party who did sign. But Grafton did not agree to buy this property of anybody who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to that vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.

It is alleged that Stephen H. Cummings, the plaintiff in this action, was the vendor, and that this sufficiently appears in the papers annexed to the memorandum and incorporated into the statement of this case.

The first ground on which it is sought to maintain this proposition is that Walker's indorsement is sufficient for that purpose.

It is very clear that Walker did not intend to hold himself out as the vendor in this case, because he describes himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he was sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. He could not in the act of signing that paper be

the agent of Grafton, for Grafton signed it for himself. The statement, therefore, did not mean that he signed for both parties, because he did not, and could not, sign as agent for Grafton.

What did he mean by putting his name there? It can have no other fair meaning than simply to say, as he does, I was the auctioneer who struck off this property.

But concede that he meant to represent the other party in that contract, a contract in which he takes care not to bind himself, who is that other party? What light does the writing of his name as auctioneer and agent throw on that question? Literally none. An anxious reader of the whole paper and its attachments would know as little who sold, or for whom Walker was selling, after his signature as he did before. To say agent for both parties may show he was agent for the one party whose name is not there, but it does not show who was that party. The paper without Walker's indorsement shows who was the purchaser, but neither with nor without it does it show who was the seller.

It is next argued that the reference to Cummings's name in the advertisement annexed to the paper signed by defendant is sufficient for this. The statement is that the sale is made to close out the estate of the late Mr. Thompson; and "any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Me." Three persons are here mentioned. One, Mr. Thompson, was dead and could not be the vendor. Another, Mr. Weeks, though not mentioned as a party selling, it may be inferred had some interest in the sale as administrator of Thompson. But Weeks does not sue, and if his name had been inserted in the contract as vendor, it would not have sustained the present action. But the true intent of that advertisement was not to describe the vendors, or even the owners of the land, but to designate persons who might give any information about the property, which one thinking of purchasing would need. This did not require that the person referred to should be the owner of the land or the party selling it. Such inquiries could as well be

answered by a lawyer, a real-estate agent, the latest keeper of the hotel, or one who had been his clerk, as by the owner. There did not arise, therefore, any implication from the reference to Cummings that he was owner, or even part owner, or that he was holding himself out as the party selling.

The next effort to sustain the instrument sued on as valid may be said to be a vague effort to show, by the verbal history of the transaction, that defendant recognized Cummings as vendor by subsequent interviews and negotiations with him on the subject of the sale. And special importance in this part of the case is attached to a letter written by Davis, a lawyer, to Cummings.

The letter is liable to three objections, as a recognition by defendant of Cummings as the party of whom he had purchased.

1. No such recognition is to be found in the letter. It consists of suggestions on the part of Davis of what had better be done with the property; that Cummings, Mrs. Thompson, and Grafton ought to take it; and that Grafton really don't wish to have any thing to do with it. It is not even a recognition of the validity of the purchase, and nowhere speaks of Cummings as the vendor, but he might rather be supposed to be a purchaser with Grafton.

2. Davis does not profess to be speaking or acting for Grafton. He writes in his own name. It is shown by other evidence that, either as attorney or for himself, he controlled the larger part of the debts against Thompson's estate, which made the sale necessary, and it may be fairly inferred that it was in this character he spoke.

3. There is no satisfactory evidence that he was authorized to act for Grafton in that transaction, and none whatever that he was authorized by him to write that letter. The New Hampshire statute requires that the authority of an agent to charge a party shall be in writing, and there is no pretence that Davis had any such authority from Grafton.

These views of the proper construction of the statute are amply sustained by authority.

In the leading case of *Wain* v. *Warlters* (5 East, 10), decided by Lord Ellenborough under the English statute, the same as

that of New Hampshire on the point in question, that eminent judge said: "The question is whether that word (agreement) is to be understood in a loose, incorrect sense in which it may be sometimes used as synonymous to promise or understanding, or in its more correct sense of signifying a mutual contract on consideration between two or more parties." He held the latter to be the true construction, and that all its essential elements must appear in the memorandum, including the consideration, which in that case was absent. This has been held to be the law in England ever since.

In *Williams* v. *Byrnes*, before the Privy Council, reported in 9 Jur. N. S. 363, decided in 1863, the defendant had in a letter to one Hardy told him that he would furnish the funds to pay for a steam-engine if the latter would find and purchase a suitable one. Hardy made a verbal contract for the engine, and the vendor sued defendant on this memorandum. Coleridge, J., in delivering the judgment of the Privy Council, said: "This language" (the language of the statute) "cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain cannot so appear unless the parties to it are specified, either nominally or by description or reference;" and the ruling of the Chief Justice that this could be done by extrinsic proof as to who was the vendor was reversed. The case is precisely in point with the one before us.

Sale v. *Lambert* (Law Rep. 18 Eq. 1) was a sale of real estate in which the party charged was the vendor. The memorandum was signed by Sale, the purchaser, for himself, and by George Jackson, the auctioneer, for the vendor. This memorandum was indorsed on a bill of particulars of the conditions of the sale, in which it was said that the property was sold by the proprietor. The Master of the Rolls held that the word "proprietor" sufficiently described the vendor, and ascertained who was the party for whom the auctioneer signed. But in *Potter* v. *Duffield* (id. 4), he held that the words "confirmed on the part of the vendor," and signed "Beadels," who were the auctioneers, did not sufficiently designate who the vendor was, and that a suit against the owner could not be sustained on the memorandum. He said: "If you could go into the evidence

as to the person who is described as vendor by Mr. Beadel, the answer would be that Polley was that person. But that is exactly what the act says shall not be decided by parol evidence."

In the case before us, Walker, the auctioneer, does not even say that he signed for the vendor, as Beadel did in the last case cited.

But the case which should have most weight in informing our judgment is *Sherburne et al.* v. *Shaw* (1 N. H. 157), because it is an authoritative construction of the statute of the State where this contract was made and the land is situated, to which the contract relates, made by the highest court of that State sixty years ago and never overruled. The case is so perfectly parallel to the one under consideration that its circumstances need not be repeated. It is sufficient to say that the want of the vendor's name in the memorandum was held fatal to any right of action, though the auctioneer's name was signed to a memorandum otherwise sufficient. The concluding language of the court is, that "the written evidence which hath been offered to prove the contract declared on, as it fails to give any intimation that plaintiffs were one of the parties to that contract, must itself be considered fatally defective and inadmissible."

The same doctrine is laid down in the excellent work of Mr. Browne on the Statute of Frauds, sects. 372 to 375, and the authorities fully cited. He also speaks of the case of *Salmon Falls Manufacturing Co.* v. *Goddard* (14 How. 446) as one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. In that case Mr. Justice Curtis delivered an able dissenting opinion in which Mr. Justice Catron and Mr. Justice Daniel concurred. It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire, concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that State on the subject.

Defendant in error relies mainly on that case and the later one of *Beckwith* v. *Talbot*, 95 U. S. 289. The latter case, however, affords no support to the argument of counsel. The defendant in that action was charged, it is true, on a memorandum in which his name was not found. But he produced that memorandum from his own possession on the trial, and letters of his written to the plaintiff while the agreement was so in his possession were given in evidence, which referred to the agreement and acknowledged its obligatory force on himself, in terms that required no parol proof to identify it as the agreement to which he referred. This was within all the cases a sufficient signing of the memorandum, though found in another paper, written by the party to be charged, to comply with the Statute of Frauds, and so this court held.

We are of opinion that there was no sufficient memorandum in writing of the agreement on which this suit was brought to sustain the verdict of the jury.

The judgment of the Circuit Court will, therefore, be reversed, and the case remanded to that court with instructions to set aside the verdict; and it is

So ordered.

MR. JUSTICE BRADLEY took no part in the decision of this case.

TOWN OF WEYAUWEGA v. AYLING.

A town in Wisconsin having, pursuant to law, voted to issue its bonds in aid of the construction of a railroad in that State, the bonds bearing date June 1, 1871, and signed by A. as chairman of the board of supervisors, and by B. as town clerk, were issued, and by A. delivered to the railroad company. When sued on the coupons by a *bona fide* holder of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B. until July 18, at which date he had ceased to be town clerk, his resignation of that office having been, June 17, tendered and accepted, and his successor duly elected and qualified. *Held*, 1. That the town was estopped from denying the date of the bonds. 2. That in the absence of any thing to the contrary, it must be assumed for all the purposes of this case that the bonds were delivered to the company by A., with the assent of the then town clerk, and that they were, therefore, issued by the proper officers of the town.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was an action by Charles H. Ayling, a citizen of Massachusetts, against the town of Weyauwega, Wisconsin, to recover the amount of overdue and unpaid interest coupons detached from certain bonds issued by that town in aid of the construction of the Wisconsin Central Railroad.

Upon the trial the following facts appeared: —

1. That under and by virtue of chapter 126 of the General Laws of the State of Wisconsin for the year 1869 the legal voters of the town of Weyauwega voted to issue negotiable bonds to the amount of $40,000, to aid in the construction of the Wisconsin Central Railroad.

2. That June 1, 1871, C. M. Fenelon was chairman of the board of supervisors of the town of Weyauwega, and C. A. Verke was the clerk of the said town.

3. That said Verke resigned his office of clerk of said town June 17, 1871; that his resignation was accepted; and on the same day one Francis W. Sackett was elected and duly qualified as such clerk, and entered upon his duties.

4. That Verke, after his resignation as town clerk as aforesaid, changed his residence to Peshtigo, and ceased to be a resident of Weyauwega.

5. That July 13, 1871, Verke signed in Peshtigo, where he then resided, the bonds mentioned in the complaint; that the date in them at the time he so signed them was June 1, 1871.

6. That he did not in fact sign the coupons mentioned in the complaint, or any of them, but that his signature to them, as well as that of Fenelon, the chairman of said town, was lithographed from genuine signatures of Verke and Fenelon.

7. That at the time Verke signed the bonds he was not clerk of the town of Weyauwega, and had not been clerk thereof since June 17, 1871.

8. That July 13, 1871, the date when Verke signed said bonds, said Sackett was the duly and legally qualified clerk of the town.

9. That Fenelon, who signed the said bonds, was at the date he signed the same the chairman of the town of Weyauwega, and as such signed the same.

10. That after the bonds were so signed, they, with the coupons annexed, were issued and delivered by Fenelon, chairman of the town of Weyauwega, to the Wisconsin Central Railroad Company, and came to the hands of the plaintiff, who, prior to their maturity, purchased and paid a full and valuable consideration for them, in good faith, and without notice of any defect in them or the coupons, or the signatures thereto.

The judges were opposed in opinion upon the following questions: —

1. Whether the town of Weyauwega was estopped from showing the true date the bonds were in fact signed by Verke.

2. Whether the bonds, having been in fact signed by him after he had ceased to be the clerk of the town, and had removed therefrom his place of residence, and become a resident of Peshtigo, in law were or could be valid or legal bonds of the town of Weyauwega.

3. Whether the fact that the bonds bear upon their face the date of June 1, 1871, and purport to be signed on that day by Fenelon, chairman, and Verke, clerk, estops or prevents the town from showing that the bonds were not in fact signed until July 13, 1871, and that on that day Verke was not the clerk of the town of Weyauwega; and if it does not, whether in law the said bonds and coupons are invalid in the hands of a *bona fide* holder of the same.

Judgment having been rendered in favor of the plaintiff in accordance with the opinion of the presiding justice, the town sued out this writ of error.

The act of 1869 provides as follows: —

"SECT. 4. . . . It shall be the duty of the proper officers in every such . . . town . . . to cause said . . . bonds so voted to be . . . issued and to be paid over or delivered to the said railroad company. . . .

"SECT. 5. For the purpose of giving effect to the provisions of this act, the proper officers of every . . . town . . . mentioned in this act are hereby declared to be . . . the chairman of the board of supervisors and the town clerk in each town."

Mr. William P. Lynde for the plaintiff in error.

The town was not estopped from showing the true date at which the bonds were in fact signed by Verke.

The enabling act authorized the chairman of the board of supervisors and the town clerk to execute bonds which should bind the town. Neither one of them could do it alone. The power was conferred upon them in their official capacity, and they were constituted the agents of the town for a special purpose. There can be no doubt that the town has a right to show that the person who signs as town clerk was not such when he executed the bonds, and had no authority to bind the town. *The Floyd Acceptances*, 7 Wall. 666; *Lee* v. *Monroe & Thornton*, 7 Cranch, 366; *Whiteside et al.* v. *United States*, 93 U. S. 247; *Mayor* v. *Eschback*, 17 Md. 282; *Chisolm* v. *City of Montgomery*, 2 Woods, 594; Story, Agency, sect. 307.

The act authorized the "proper officers" of the town to issue the bonds; and those officers are declared to be the chairman of the board of supervisors and the town clerk. Verke, when the bonds were signed, was neither. He occupied no official position whatever, and his signature could have no greater force or effect than that of any other private citizen. He certainly could not bind the town, of which he was neither an officer nor a resident. 2 Coler, Municipal Bonds, 136; *Head* v. *Providence Insurance Co.*, 2 Cranch, 127; *Freud* v. *Dennett*, 4 Sco. N. R. 583; *McSpeden* v. *The Mayor, &c. of New York*, 7 Bosw. (N. Y.) 606; *Zottman* v. *San Francisco*, 20 Cal. 103.

The power of the town to issue its bonds to aid in the construction of this road being derived entirely from an act of the legislature which declares that they shall be issued by the chairman of the board of supervisors and the town clerk, the mode prescribed is essential to the validity of the bonds, — indeed, there is no power to issue them in any other way, — therefore, having been in fact signed by Verke, after he had ceased to be the clerk, and removed his residence to Peshtigo, the bonds are invalid and do not bind the town.

There is nothing in this record to show that the town or its officers, except the chairman of the board of supervisors, who is one of the wrong-doers, ever knew of the execution of these bonds until this suit was brought, nor to show that the town received any stock or any other consideration for the bonds. It

would seem that they were given to the company as a gratuity. What has the town done or said that should estop it from telling the truth? There is a class of cases in which it has been held that when a power is given to be exercised by certain persons upon conditions precedent, the existence of which they are authorized to ascertain and declare, and they exercise the power, a holder for value of negotiable securities issued thereunder need not go behind the authority; but in all of them there was express legislative authority to issue the bonds upon those conditions. Of this class are the following cases: *Commissioners of Knox County* v. *Aspinwall et al.*, 21 How. 539; *Bissell et al.* v. *City of Jeffersonville*, 24 id. 287; *Moran* v. *Commissioners of Miami County*, 2 Black, 722; *Mercer County* v. *Hackett*, 1 Wall. 83; *Gelpcke* v. *City of Dubuque*, id. 175; *Von Hostrop* v. *Madison City*, id. 291; *Rogers* v. *Burlington*, 3 id. 654; *Supervisors* v. *Schenck*, 5 id. 772; *Lee County* v. *Rogers*, 7 id. 181.

The distinction between those cases and that now before the court is, that these bonds were not "issued by the body intrusted to do so."

Mr. Edwin H. Abbot, contra.

The recital in the bonds estops the town from setting up any defect of execution which does not destroy their genuineness.

Verke's signature as clerk *nunc pro tunc* was a purely ministerial act, which speaks truly from and at the date of the bond. It lacks every essential element of forgery. He was clerk at the date of the bonds. The coupons bore his genuine fac-simile, affixed while he was clerk, and accepted by the town as his signature before his resignation. No one else could have completed, according to commercial usage, the formal certification of them as the obligations of the town.

Yet even if Verke's signing, under the circumstances stated, amounted to forgery, the delivery of the bonds by the proper chief executive officer of the town was such an adoption of the signature as genuine, as ever afterwards estopped the town from impeaching it. *Beaman* v. *Duck*, 11 Mee. & W. 251; *Levy* v. *Bank of United States*, 4 Dall. 284; *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 332; 2 Daniel, Negotiable

Instruments, sect. 1351; *Woodruff* v. *Munroe*, 33 Md. 146; *Casco Bank* v. *Keene*, 53 Me. 104; *Leach* v. *Buchanan*, 4 Esp. 226; *Greenfield Bank* v. *Crafts*, 4 Allen (Mass), 447; *Union Bank* v. *Middlebrook*, 33 Conn. 95; *Howard* v. *Duncan*, 3 Lans. (N. Y.) 174; *Brook* v. *Hook*, Law Rep. 6 Ex. 89; *Williams* v. *Bayley*, Law Rep. 1 H. L. 200, 221; *Wilkinson* v. *Stoney*, 1 Jebb & S. 509; *Robarts* v. *Tucker*, 16 Q. B. 577; *Arnold* v. *Cheque Bank*, Law Rep. 1 C. P. D. 578; *Meacher* v. *Fort*, 3 Hill (S. C.), 227; *Hortsman* v. *Henshaw*, 11 How. 177; *Price* v. *Neal*, 3 Burr. 1354; *Cooper* v. *Meyer*, 10 Barn. & Cress. 468; S. C. 5 Mann. & R. 387; *Young* v. *Grote*, 4 Bing. 253; *Ingham* v. *Primrose*, 7 C. B. N. S. 82; *Greenfield Bank* v. *Stowell*, 123 Mass. 196; Bigelow, Estoppel, 397; *Baxendale* v. *Bennett*, Law Rep. 3 Q. B. D. 525, 530.

The directions of the Wisconsin statute are mandatory. The town cannot set up its own neglect to comply with them, in order to defeat its just debt by denying the obligation.

The acts of a municipal officer within the scope of his authority in delivering a bond, ministerially defective in its execution, estop the municipal corporation from setting up mere defects in execution when his authority extended to the delivering of a valid obligation of substantially the same form. The same rule of agency applies to towns and individuals.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The first question certified in this case is answered in the affirmative. The legal voters of the town, by a vote duly taken pursuant to statutory authority for that purpose, directed the issue of the negotiable bonds in controversy. As soon as this vote was given, it became the duty of the chairman of the board of supervisors and the clerk of the town to cause the bonds to be made out and delivered to the railroad company. Such was the requirement of the statute under which the vote of the town was taken. The designated officers had no discretion in the premises.

After the vote, an appropriate form of bond and coupons was lithographed and printed, with blanks in the bond for the signatures of the chairman and clerk. As printed, the bonds

bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of the town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of a new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached, and paid their full value without notice of any claim of defence to their due execution. Under these circumstances, we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds; 2, that the necessary vote had been given; 3, that at the date of the bonds Verke was clerk and Fenelon chairman; 4, that their signatures were genuine; and, 5, that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman. If a bank puts out a note for circulation bearing the signature of one who was in fact president of the bank when the note bore date, no one will pretend that it could be shown as a defence to the note when sued upon by a *bona fide* holder, that the signature of the person purporting to be president was affixed after he went out of office. So if one puts out a note purporting to be signed by himself, but which was in fact signed by another having at the time no authority from him, he cannot prove the forgery or want of authority in the signer as against a *bona fide* holder. The reason is obvious. The bank by issuing the note, and the individual by delivering the paper which purported to be his obligation, adopted what they thus put out as their own, and became bound accordingly.

The same principle applies in this case. There is no pretence that the obligation of these bonds is other or different

from that authorized by the voters. So far as the record shows, the town has received and retains the consideration for which they were voted. No bad faith is imputed to any one. It is true the chairman alone made the actual delivery to the railroad company; but the presumption is, that what he did was assented to by the clerk in office at the time. Certainly it could not have been contemplated that, to make a binding obligation, both the chairman and clerk must have been present when the delivery to the railroad company was made; and as the presumption always is, in the absence of any thing to the contrary, that a public officer while acting in his official capacity is performing his duty, it must be assumed for all the purposes of this case that the bonds were delivered to the railroad company by the chairman with the assent of the clerk, and, therefore, that they were issued as negotiable instruments by the proper officers of the town. If the fact was otherwise, it was incumbent on the town to make the necessary proof.

It is unnecessary to answer any of the other questions certified, further than has already been done. The answer to the first question is decisive of the case.

Judgment affirmed.

CASE v. BEAUREGARD.

A member of a firm assigned and transferred in good faith his interest in the partnership property in payment of a just debt for which he was solely liable. The creditor took possession of it and sold it to A., who, by an act of sale, in which the other member of the firm united, transferred it for a valuable consideration to B. The firm and the members of it were insolvent. C., claiming to be a simple-contract creditor of the firm, then filed his bill to subject the property to the payment of his debt. *Held*, that C. had no specific lien on the property, and there being no trust which a court of equity can enforce, the bill cannot be sustained.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This suit was brought July 10, 1869, by Frank F. Case, receiver of the First National Bank of New Orleans, against Gustave T. Beauregard, Thomas P. May, Augustus C. Graham,

George Binder, Alexander Bonneval, Joseph Hernandez, the New Orleans and Carrollton Railroad Company, and the Fourth National Bank of New York, to recover a debt of $237,000.89, which he claimed was due from, and had been contracted by, Beauregard, May, and Graham, while they were partners, and carrying on business as such; and to have certain transfers of partnership property set aside and subjected to the payment of the debt. Beauregard leased, April 12, 1866, from that company its railroad tracks, its rolling-stock, and corporate privileges for twenty-five years. The lease, although made to him individually, was entered into on his part in view of a partnership to conduct the enterprise, which on the first of that month was formed between him, May, and Graham, for operating under that lease the road. By the terms of the partnership, which was to continue for twenty-five years from the date of the lease, he was charged with the management of the road, was to receive only a salary for his services, and when the capital furnished by May and Graham was reimbursed to them with eight per cent interest, the partners were to share the profits equally, and all losses were to be equally borne by them. On their part, May and Graham were to furnish the requisite capital, fixed at $300,000. Locomotives had been used on the road, but after the date of the lease the tracks were adapted to horse-cars, important changes effected, and large purchases of property made, for the uses and better equipment of the road, all of which involved a heavy expenditure of money.

May 16, 1867, May assigned his interest to the United States. Graham, on the 8th of that month, assigned his interest to the Fourth National Bank of New York. The bank failed in that month, and was a creditor of the partnership. The latter had overdrawn, between Sept. 6, 1866, and May 1, 1867, the account kept in that institution in the name of Beauregard, as such lessee. At that time, May was president of the bank. He directed the treasurer of the partnership to draw upon the bank without regard to the state of the accounts, and instructed the paying teller to honor the checks, promising to make good the deficit. It amounted to the sum for which this suit was brought. No part of it has ever been paid to the bank. At one time, May deposited with it, as cash, a demand note for

$40,000, drawn by him as attorney for Beauregard. At another time, he drew a draft upon Graham for $125,000, which was also credited upon the account as cash. Neither the draft nor the note was paid. Both were held by the bank, and were overdue at the time of its failure.

May had obtained from the assistant treasurer of the United States at New Orleans public moneys, he knowing them to be such, for his individual uses. In part payment of this indebtedness he assigned, with other property, the balance to his credit on the books of the bank, amounting to $315,779.10, and his interest in the railroad company, its property and appurtenances, and bound himself to execute any further acts or instruments necessary to give a complete title to the property transferred. A few days thereafter, May 16, 1867, he, claiming to act under a power of attorney from Graham, conveyed, by an act passed before a notary public of New Orleans, to the United States "all and singular the right, title, interest, share, property, claim, and demand of every nature and kind whatsoever, of them, the said May and Graham, and each of them, in and to the New Orleans and Carrollton Railroad, the lease and other franchises thereof, and the railroad tracks, rolling-stock, engines, cars, live-stock, and other appurtenances thereunto belonging or in any wise appertaining;" the same having been acquired under the lease and the articles of partnership aforesaid. The United States was to give him credit for all that should be received from the proceeds of the sale or other disposition of the interest conveyed.

The United States, Oct. 31, 1867, in consideration of $228,000, conveyed the property so acquired by said act to Binder, Bonneval, and Hernandez, and further stipulated to save them harmless from any claim that might be set up by the bank for $112,009.09, apparently standing to the debit of Beauregard, as lessee of the road, but which the act declares was due by May, and to defend the transferees from an assignment of Graham's interest to the Fourth National Bank of the City of New York. The transferees assumed the liabilities due and owing by Graham and May, as lessees, on account of the railroad, as set out in a schedule of direct debt, amounting to $122,852.58, and of prospective debt for additions, $40,000, — making $162,852.58.

Oct. 15, 1867, Binder, Bonneval, and Hernandez joined Beauregard in an agreement or act of fusion with the railroad company, whereby they surrendered to the latter all interest they had in the lease of the road and property of the partnership; and the company, being thus restored to the property and franchises with which it had parted, entered into the possession thereof. May, Graham, and Beauregard are insolvent.

An act of the legislature was passed, by which the company was authorized to scale its present stock, issue additional shares of its capital stock to the extent of the value of the improvements placed on the road during the partnership, and to consolidate its interests with the other parties. Accordingly the company increased its stock so as to make it $800,000, of which one equal moiety, or $400,000, was awarded to Binder, Hernandez, Bonneval, and Beauregard, as representing in their right the value of the improvements put on the road by the late partnership, whose interests to the extent of two-thirds had passed to the purchasers from the United States, the other one-third being owned by Beauregard; and for and in consideration of the $400,000 of its capital stock, the New Orleans and Carrollton Railroad Company acquired and was put into possession of all the real estate and other property acquired by the late partnership of May, Graham, and Beauregard.

For the amount mentioned in his assignment, as standing to his individual credit, May gave a "certified" check, of which the United States is the present holder and owner. Of the amount transferred from the bank to the sub-treasury in New Orleans, enough was applied to take up a check drawn by May on the bank, dated Feb. 15, 1867, and forming part of the assets of the assistant treasurer at New Orleans, and the remainder, $10,378.28, was credited on his check for $315,779.10.

The complainant charges that the First National Bank, being the creditor of the partnership, had a lien or privilege on its effects, and was entitled to be paid therefrom to the exclusion of the creditors of any member of the partnership; that the partnership was insolvent; that none of its members was able to pay his individual debts, or authorized to dispose of the partnership property for the payment of such debts; that the deed to the United States, its deed to Binder, Bonneval, and Hernan-

dez, and the deed of the latter parties and Beauregard to the railroad company, are in fraud of the rights of the bank as a creditor of the partnership, and that the same should be cancelled and the partnership property sold to satisfy the prior and privileged claim of the bank. He prays that Binder, Bonneval, Hernandez, and Beauregard be enjoined from transferring or incumbering their stock in the company, and that the latter be enjoined from recognizing or permitting such transfer, and for general relief.

Bonneval, Binder, Hernandez, and the Carrollton Railroad Company answered, and pleaded the existence of the debt due from the bank to May as a bar to any claim upon them under the allegations of the bill.

The Fourth National Bank also answered.

The bill was dismissed on a final hearing, and the complainant appealed here.

Mr. J. D. Rouse and *Mr. Charles Case* for the appellant.

The object of the bill is to subject partnership assets to the payment of a partnership debt. Such assets belong to the partnership. Each partner is entitled only to a share of what remains after payment of partnership debts and a settlement of accounts. *Bank* v. *Carrollton Railroad*, 11 Wall. 628, and the authorities there cited.

The Code of Louisiana gives a statutory protection to the rights of a creditor of the partnership, recognizing those which the courts of chancery have elsewhere established, and adding thereto in his favor a privilege upon partnership assets. The latter are a trust fund, or the common pledge of the partnership creditors, who must be paid out of it before the creditors of the respective partners; and the transfer by one of the latter in payment of his separate debts is a fraudulent conversion of the assets, and his creditors take as against those of the firm no title thereto. *Hagan et al.* v. *Scott*, 10 La. 345; *Gardiner et al.* v. *Smith*, 12 id. 370; *Claiborne et al.* v. *Creditors*, 18 id 279; *Bank of Tennessee* v. *McKeage*, 11 Rob. (La.) 130; *Moore* v. *Hampton et al.*, 3 La. Ann. 192; *Smith* v. *McMicken*, id. 319; *Saloy* v. *Albrecht*, 17 id. 75; *Succession of Beer*, 12 id. 698; *Dwight* v. *Simon*, 4 id. 496.

At the time of the transfer by May of the property in ques

tion, in part payment of his individual indebtedness, his creditor knew that the partnership was indebted to the bank. All subsequent purchasers, when they acquired their respective interests, were cognizant of the same fact. The partnership and all of its members are insolvent, and its only creditor is the bank. The partnership property being largely *in esse*, and in possession of one of the defendants, is accessible only by the aid of a court of chancery. The bank has no remedy at law, and it is not necessary that the claim be established by judgment. The complainant is, therefore, entitled to relief in equity. *Russell* v. *Clark's Executors*, 7 Cranch, 69; *Thurmond* v. *Reese*, 3 Ga. 449; *Croone* v. *Bivens*, 2 Head (Tenn.), 339; *Cornell* v. *Radway*, 22 Wis. 260; *Sanderson* v. *Stockdale*, 11 Md. 563; *Innes* v. *Lansing*, 7 Paige (N. Y.), 583; *O'Brien et al.* v. *Coulter et al.*, 2 Blackf. (Ind.) 421.

Mr. John A. Campbell and *Mr. Henry C. Miller* for the appellee.

Mr. Assistant Attorney-General Smith for the United States.

MR. JUSTICE STRONG delivered the opinion of the court.

The object of this bill is to follow and subject to the payment of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. There is little if any controversy respecting the facts, and little in regard to the principles of equity invoked by the complainant. The important question is, whether those principles are applicable to the facts of the case.

No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference,

sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice* v. *Barnard et al.*, 20 Vt. 479; *Appeal of the York County Bank*, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin* (6 Ves. 119), where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity

against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*. *Kimball* v. *Thompson*, 13 Metc. (Mass.) 283; *Allen* v. *The Centre Valley Company et al.*, 21 Conn. 130; *Ladd* v. *Griswold*, 9 Ill. 25; *Smith* v. *Edwards*, 7 Humph. (Tenn.) 106; *Robb and Others* v. *Mudge and Another*, 14 Gray (Mass.), 534; *Baker's Appeal*, 21 Pa. St. 76; *Sigler & Richey* v. *Knox County Bank*, 8 Ohio St. 511; *Wilcox* v. *Kellogg*, 11 Ohio, 394.

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider whether, in view of the rules thus settled and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and compel its application to the payment of the debt due from the firm to the bank of which he is the receiver.

The partnership, while it was in existence, was composed of three persons, May, Graham, and Beauregard, but it had ceased to exist before this suit was commenced. It was entirely insolvent, and all the partnership effects had been transferred to others for valuable considerations. None of the property was ever within the jurisdiction of the court for administration.

On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the City of New York. By subsequent assignments, made on the 14th and 16th of May, 1869, May, the second partner, transferred all his interest in the partnership property

to the United States, and by the same instruments transferred to the United States, by virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest obtained from May and Graham in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez, and George Binder. On the 15th of October next following, an act of fusion was executed between the New Orleans and Carrollton Railroad Company, Beauregard, Bonneval, Hernandez, and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders.

The effect of these transfers and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. *Baker's Appeal*, 21 Pa. St. 823. That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm. Some time after, one of the remaining three sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the debts of the last firm composed of the two; and it was held that the creditors of the first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in *McNutt* v. *Strayhorn & Hobson* (39 id. 269), it was ruled that though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted

with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and, therefore, there is no case for the application of the rule. See also *Coover's Appeal*, 29 id. 9. Unless, therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the complainant is receiver has no claim upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such a creditor when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors, — a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that act made provision for some of the debts of the partnership. And it has been ruled that where one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sale and conveyances are not *prima facie* void, as against creditors of the firm, but are *prima facie* valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. *Kimball* v. *Thompson*, 13 Metc. (Mass.) 283; *Flach et al.* v. *Charron et al.*, 29 Md. 311. A similar doctrine is asserted in some of the other cases we have cited; and see 21 Conn. 130. In the present case we find no such proof. We discover nothing to impeach the *bona fides* of the transaction, by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Art. 2823 of the Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not

perceive that this provision differs materially from the general rule of equity we have stated. It creates no specific lien upon partnership property, which continues after the property has ceased to belong to the partnership. It does not forbid *bona fide* conversion by the partners of the joint property into rights in severalty, held by third persons. It relates to partnership property alone, and gives a rule for marshalling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Art. 3244 of the Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equity can enforce; and it was well said by the circuit justice, that, without some constituted trust or lien, "a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

Decree affirmed.

WILKERSON v. UTAH.

The legislative act of Utah, passed March 6, 1852, provides that a person convicted of a capital offence "shall suffer death by being shot, hanged, or beheaded," as the court may direct, or "he shall have his option as to the manner of his execution." Its Penal Code of 1876, by which all acts and parts of acts inconsistent therewith are repealed, provides that any person convicted of murder in the first degree "shall suffer death," and that "the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed." A., convicted of having, June 11, 1877, committed murder in the first degree in that Territory, was, by the proper court thereof, sentenced to be publicly shot. *Held*, that the sentence was not erroneous.

ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Submitted by *Mr. E. D. Hoge* and *Mr. P. L. Williams* for the plaintiff in error, and by *The Solicitor-General* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Duly organized Territories are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Rev. Stats., sect. 1851.

Congress organized the Territory of Utah on the 9th of September, 1850, and provided that the legislative power and authority of the Territory shall be vested in the governor and legislative assembly. 9 Stat. 454.

Sufficient appears to show that the prisoner named in the record was legally charged with the wilful, malicious, and premeditated murder of William Baxter, with malice aforethought, by indictment of the grand jury in due form of law, as fully set forth in the transcript; and that he, upon his arraignment, pleaded that he was not guilty of the alleged offence. Pursuant to the order of the court, a jury for the trial of the prisoner was duly impanelled and sworn; and it appears that the jury, after a full and fair trial, found, by their verdict, that the prisoner was guilty of murder in the first degree.

Regular proceedings followed, and the record also shows that

the presiding justice in open court sentenced the prisoner as follows: That "you be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the fourteenth day of December next; that between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead."

Proceedings in the court of original jurisdiction being ended, the prisoner sued out a writ of error and removed the cause into the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. Final judgment having been rendered in the Supreme Court of the Territory, the prisoner sued out the present writ of error, the act of Congress providing that such a writ from this court to the Supreme Court of the Territory will lie in criminal cases where the accused is sentenced to capital punishment or is convicted of bigamy or polygamy. 18 Stat. 254.

Appended to the proceedings is the assignment of error imputed to the court below, which is repeated in the same words in the brief of his counsel filed since the case was removed into this court. No exception was taken to the proceedings in either court prior to the sentence, the assignment of error being that the court below erred in affirming the judgment of the court of original jurisdiction and in adjudging and sentencing the prisoner to be shot to death.

Murder, as defined by the Compiled Laws of the Territory, is the unlawful killing of a human being with malice aforethought, and the provision is that such malice may be express or implied. Comp. Laws Utah, 1876, 585. Express malice is when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and it may be implied when there is no considerable provocation, or when the circumstances attending the killing show an abandoned or malignant heart.

Criminal homicide, when perpetrated by a person lying in wait, or by any other kind of wilful, deliberate, malicious, and premediated killing, or which is committed in the perpetration or attempt to perpetrate any one of the offences therein enu-

merated, and evidencing a depraved mind, regardless of human life, is murder in the first degree. Id. 586.

Provision is also made that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and that every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years. Comp. Laws Utah, 1876, 586.

Duly convicted of murder in the first degree as the prisoner was by the verdict of the jury, it is conceded that the existing law of the Territory provides that he "shall suffer death;" nor is it denied that the antecedent law of the Territory which was in force from March 6, 1852, to March 4, 1876, provided that "when any person shall be convicted of any crime the punishment of which is death, . . . he shall suffer death by being shot, hung, or beheaded, as the court may direct," or as the convicted person may choose. Sess. Laws Utah, 1852, p. 61; Comp. Laws Utah, 1876, 564.

When the Revised Penal Code went into operation, it is doubtless true that it repealed that provision, as sect. 400 provides that "all acts and parts of acts" heretofore passed "inconsistent with the provisions of this act be and the same are hereby repealed." Comp. Laws Utah, 651.

Assume that sect. 124 of the prior law is repealed by the Revised Penal Code, and it follows that the existing law of the Territory provides that every person guilty of murder in the first degree shall suffer death, without any other statutory regulation as to the mode of executing the sentence than what is found in the following enactment of the Revised Penal Code. Sect. 10 provides that "the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed." Comp. Laws Utah, 1876, 567.

Construed as that provision must be in connection with the enactment that every person guilty of murder in the first degree shall suffer death, and in view of the fact that the laws of the Territory contain no other specific regulation as to the

mode of executing such a sentence, the court here is of the opinion that the assignment of error shows no legal ground for reversing the judgment of the court below. Authority to pass such a sentence is certainly not possessed by the circuit courts of the United States, as the act of Congress provides that the manner of inflicting the punishment of death shall be by hanging. Rev. Stat., sect. 5325.

Punishments of the kind are always directed by the circuit courts to be inflicted in that manner, but organized Territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. By virtue of that power the legislative branch of the Territory may define offences and prescribe the punishment of the offenders, subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted. Story, Const. (3d ed.), sect. 1903.

Good reasons exist for supposing that Congress never intended that the provision referred to, that the punishment of death shall be by hanging, should supersede the power of the Territories to legislate upon the subject, as the congressional provision is a part of the first crimes act ever passed by the national legislature. 1 Stat. 114. Different statutory regulations existed in the Territory for nearly a quarter of a century, and the usages of the army to the present day are that sentences of the kind may in certain cases be executed by shooting, and in others by hanging.

Offences of various kinds are defined in the rules and articles of war where the offender, if duly convicted, may be sentenced to the death penalty. In some of those cases the provision is that the accused, if convicted, shall suffer death, and in others the punishment to be awarded depends upon the finding of the court-martial; but in none of those cases is the mode of putting to death prescribed in the articles of war or the military regulations. Art. 96 provides that no person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial, and in the cases specified in the rules and articles enacted by Congress. Rev. Stat., p. 238.

Repeated instances occur where the death penalty is pre-

scribed in those articles; but the invariable enactment is that the person guilty of the offence shall suffer death, without any specification as to the mode in which the sentence shall be executed, and the regulations of the army are as silent in that respect as the rules and articles of war. Congress having made no regulations in that regard, the custom of war, says a learned writer upon the subject, has, in the absence of statutory law, determined that capital punishment be inflicted by shooting or hanging; and the same author adds to the effect that mutiny, meaning mutiny not resulting in loss of life, desertion, or other military crime, if a capital offence, is commonly punished by shooting; that a spy is always hanged, and that mutiny, if accompanied by loss of life, is punished in the same manner, — that is, by hanging. Benet, Courts-Martial (5th ed.), 163.

Military laws, says another learned author, do not say how a criminal offending against such laws shall be put to death, but leave it entirely to the custom of war; and his statement is that shooting or hanging is the method determined by such custom. DeHart, Courts-Martial, 196. Like the preceding author, he also proceeds to state that a spy is generally hanged, and that mutiny unaccompanied with loss of life is punished by the same means; and he also concurs with Benet, that desertion, disobedience of orders, or other capital crimes are usually punished by shooting, adding, that the mode in all cases, that is, either shooting or hanging, may be declared in the sentence.

Corresponding rules prevail in other countries, of which the following authorities will afford sufficient proof: Simmons, Courts-Martial (5th ed.), sect. 645; Griffith, Military Law, 86.

Capital punishment, says the author first named, may be either by shooting or hanging. For mutiny, desertion, or other military crime it is commonly by shooting; for murder not combined with mutiny, for treason, and piracy accompanied with wounding or attempt to murder, by hanging, as the sentence in England must accord with the law of the country in regard to the punishment of offenders. Exactly the same views are expressed by the other writer, which need not be reproduced.

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to

show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial. Simmons, sects. 759, 760; DeHart, pp. 247, 248.

Where the conviction is in the civil tribunals, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com. 377.

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's Treatise. Arch. Crim. Pr. and Pl. (8th ed.) 584.

Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the king, though he cannot vary the sentence so as to aggravate the punishment, may mitigate or remit a part of its severity. 1 Chitt Cr. L. 787; 1 Hale, P. C. 370.

Difficulty would attend the effort to define with exactness

the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr. L. (7th ed.), sect. 3405.

Concede all that, and still it by no means follows that the sentence of the court in this case falls within that category, or that the Supreme Court of the Territory erred in affirming the judgment of the court of original jurisdiction. Antecedent to the enactment of the code which went into operation March 4, 1876, the statute of the Territory passed March 6, 1852, provided that when any person was convicted of any capital offence he shall suffer death by being shot, hanged, or beheaded, as the court may direct, subject to the qualification therein expressed, to the effect that the person condemned might have his option as to the manner of his execution, the meaning of which qualification, as construed, was that the option was limited to the modes prescribed in the statute, and that if it was not exercised, the direction must be given by the court passing the sentence.

Nothing of the kind is contained in the existing code, and the legislature in dropping the provision as to the option failed to enact any specific regulation as to the mode of executing the death penalty. Instead of that, the explicit enactment is that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court.

Beyond all question, the first clause of the provision is applicable in this case, as the jury gave no such recommendation as that recited in the second clause, the record showing that their verdict was unconditional and absolute, from which it follows that the sentence that the prisoner shall suffer death is legally correct. Comp. Laws Utah, 1876, p. 586.

Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual,

within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner. Statutory directions being given that the prisoner when duly convicted shall suffer death, without any statutory regulation specifically pointing out the mode of executing the command of the law, it must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence prescribed. Id., p. 567.

Persons guilty of murder in the first degree "shall suffer death," are the words of the territorial statute; and when that provision is construed in connection with sect. 10 of the code previously referred to, it is clear that it is made obligatory upon the court to prescribe the mode of executing the sentence of death which the code imposes where the conviction is for murder in the first degree, subject, of course, to the constitutional prohibition, that cruel and unusual punishment shall not be inflicted.

Other modes besides hanging were sometimes resorted to at common law, nor did the common law in terms require the court in passing the sentence either to prescribe the mode of execution or to fix the time or place for carrying it into effect, as is frequently if not always done in the Federal circuit courts. At common law, neither the mode of executing the prisoner nor the time or place of execution was necessarily embodied in the sentence. Directions in regard to the former were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term; as, for example, in the case of murder, the direction was "let him be hanged by the neck," which calendar was signed by the judge and clerk, and constituted in many cases the only authority of the officer as to the mode of execution. 4 Bl. Com. 404; Bishop, Cr. Proc. (2d ed.), sects. 1146–1148; Bishop, Cr. L. (6th ed.), sect. 935.

Reference is made to the cases of *Hartung* v. *The People* (22 N. Y. 95), *The People* v. *Hartung* (23 How. Pr. (N. Y.) 314), *Same* v. *Same* (26 id. 154), and *Same* v. *Same* (28 id. 400), as supporting the theory of the prisoner that the court possessed no authority to prescribe the mode of execution; but the court here is entirely of a different opinion, for the reasons already given.

Judgment affirmed.

BURBANK v. SEMMES.

A marshal's deed which includes, with certain lands legally sold under the confiscation act of July 17, 1862 (12 Stat. 589), a parcel not mentioned either in the information, the monition, or the decree of condemnation, under which the sale was made, passes no title to such parcel.

ERROR to the Supreme Court of the State of Louisiana.

This was an action brought in the Fourth District Court of the Parish of New Orleans by Thomas J. Semmes, against Edward W. Burbank, for the recovery of one-half of lot No. 15, fronting on Edward Street, in the city of New Orleans, in the Square bounded by Annunciation, Benjamin, St. Thomas, and Edward Streets.

Semmes prayed that he be adjudged the lawful owner of the lot, and entitled to the possession thereof.

Burbank claimed title as the purchaser under a *venditioni exponas*, directed to the marshal of the United States for the then Eastern District of Louisiana, issued by the District Court for that district in *United States* v. *Six Lots of Ground*, property of Thomas J. Semmes. The suit was brought under the act of Congress of July 17, 1862, 12 Stat. 589. The marshal conveyed the lot to Burbank, by deed bearing date June 15, 1865. Semmes was the owner of several lots in that square; and by the decree of condemnation rendered in that suit his title in and to lots 14, 16, 17, and part of 18 was divested. Neither in the libel, the monition, the decree of condemnation, nor the writ, was lot 15 mentioned.

A judgment was rendered for the plaintiff, which was affirmed by the Supreme Court of the State, and Burbank then sued out this writ of error.

Mr. Thomas J. Durant for the plaintiff in error.
Mr. Thomas J. Semmes, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Seizure of the estate, property, money, stocks, credits, and effects of certain persons engaged in rebellion was authorized to be made by the act of Congress to suppress insurrection,

and it was made the duty of the President to apply the proceeds of the same when condemned to the support of the army. 12 Stat. 590.

Proceedings *in rem*, on the 7th of August, 1863, were instituted in the District Court for the Eastern District of Louisiana, under the said confiscation act, against six certain lots of land, as the real property of the original plaintiff in the present suit, which resulted, on the 5th of April, 1865, in a decree of that court condemning the property described in the information. On the 11th of the same month a writ of *venditioni exponas* was issued, commanding the marshal to sell the property on the day named in the writ; but the marshal did not sell the same on that day, for the want of bidders. Unable to comply with the order in that respect, he withdrew the property from sale, and gave a new notice, as directed by the prior order of the court.

Two lots of land were embraced in the information and in the decree of condemnation, which in fact were not the property of the present plaintiff. Both of those lots belonged to an innocent third person, and the true owner of the same in the mean time, to wit, on the 2d of May in the same year, filed a petition in the same court setting up his right to the two lots, and stating that they were improperly advertised for sale by the marshal, and prayed the court to open the decree to enable him to assert his title. Consent in writing to that effect having been given by the district attorney, the court granted the prayer of the petitioner, and opened the decree for the purpose of enabling the intervenor to submit his claim to those two lots, as shown by the evidence. Pursuant thereto, the court, on the 31st of May in the same year, rendered judgment restoring those two lots to the intervenor, as claimed in his petition. Due correction of the decree of condemnation having been made, the return of the marshal shows that he sold the residue of the lots described in the information, pursuant to the second advertisement, for the amount specified in the record, and that he paid the money into the registry of the court.

Subsequent application was made by the present plaintiff to set aside the default against him, and for leave to file his claim

and answer. Leave to that effect was granted; and due notice to the purchaser of the lots having been given, he appeared and filed exceptions to the proceedings. Both parties were heard; and the court overruled the exceptions of the purchaser, set aside the default of the defendant, and finally rendered judgment dismissing the information, and restored the property to the original owner.

Proper steps were taken in behalf of the United States to remove the cause into the Circuit Court, where the judgment of the District Court was in all things reversed and judgment rendered, that the original judgment rendered by the District Court should stand and remain in full force and effect, and that the sale made by the marshal do stand confirmed, which decree of the Circuit Court was subsequently affirmed in this court. *Semmes* v. *United States*, 91 U. S. 21; *United States* v. *Six Lots of Ground*, 1 Woods, 234.

None of the foregoing proceedings are now controverted by either of the parties to the present controversy; but the plaintiff instituted the present suit in the Fourth District Court for the Parish of Orleans, in which he alleges that he is the sole owner and absolute proprietor of the lot of land described in the complaint as No. 15 on the plan therein referred to, and he avers that the defendant, on the 17th of June, 1865, unlawfully obtruded himself into and took possession of the said lot, with the buildings thereon, and has ever since withheld and now withholds possession of the same from the petitioner.

Service was made; and the defendant appeared and filed an answer, in which he admits that he is in possession of the premises, but alleges that he is the owner and possessor of the same in good faith, by virtue of an adjudication to him at the marshal's sale under the before-mentioned writ of *venditioni exponas*, and he makes *profert* of the marshal's deed to him of the premises as evidence of his title. Proofs were taken, hearing had, and the court of original jurisdiction entered a decree that the plaintiff is the lawful owner of the lot, with the improvements described in the complaint.

Conclusive proofs were introduced by the plaintiff showing that he was the lawful owner of the lot in question prior to the confiscation proceedings, and that he acquired the fee-

simple title to the same by exchanging part of lot 18 for the same with the former owner of the lot in question.

Beyond all doubt the title of plaintiff to the same is perfect, unless the lot was condemned and the title to the same conveyed to the defendant by virtue of the marshal's sale under the confiscation proceedings. Suffice it to say that the defendant claims title to the premises upon no other ground, and in respect to that the subordinate court remarked that neither in the information nor the monition, or the decree of condemnation, is there any reference whatever to the lot in question, or to the fractional part thereof purchased by the complainant, from which it follows to a demonstration that the property was never condemned as forfeited to the United States. Nor has the defendant any other evidence of title than what is exhibited in the deed of the marshal; and it is clear that inasmuch as the decree of condemnation did not apply to the lot in controversy, the marshal's sale of the same was utterly without warrant or authority of law, and that as against the plaintiff it can have no effect to change the ownership of the premises.

Application for new trial was made by the defendant, which was overruled, and he appealed to the Supreme Court of the State, where the parties were again heard, and the Supreme Court of the State affirmed the judgment of the subordinate court. Immediate steps were taken by the defendant to remove the cause into this court for re-examination.

Of the errors assigned three only need be noticed, as the others are deemed immaterial: 1. That the court decided that the confiscation proceedings did not include the lot in question, upon insufficient grounds. 2. That the property was condemned as a whole, and not the particular lots of which it was composed. 3. That the owner, inasmuch as he did not point out the defect of description at the trial, is estopped to claim the property. *Semmes* v. *Burbank*, 28 La. Ann. 694.

Propositions of like character, it seems, were presented to the State Supreme Court, and it is difficult to see what better answer can be given to them than that found in the opinion of that court.

Half of lot 15 is the subject of the present controversy, which fronts on Edward Street in the Square bounded as described

in the petition. Title to the same is claimed by the defendant under the decree of confiscation and the sale by the marshal under the writ of *venditioni exponas*. He admits that the property belonged to the plaintiff prior to those proceedings, but contends that the title was conveyed to him by the marshal's deed. On the other hand, the plaintiff concedes that the confiscation proceedings were regular, but avers that the property in question was not embraced in those proceedings.

Six lots were described in the information, two of which, sometimes described as one, did not belong to the accused party, and were in the course of the proceedings restored to the true owner. By the decree of condemnation the title of the plaintiff, as the accused party, was divested of lots 14, 16, 17, and part of 18. Lot 15, which is the lot in question, was not mentioned either in the information, the monition, or the decree of condemnation. Nor did the *venditioni exponas* authorize the sale of any other property than that described in the information and decree of condemnation. Nothing, therefore, in the semblance of title is possessed by the defendant except the marshal's deed, and it is clear that the marshal could only make a valid title to the property described in the decree of condemnation, as that was all that became vested in the United States; and it is equally clear that he could not sell property not authorized by the writ placed in his hands for execution.

Viewed in the light of these suggestions, it is clear that the decision of the State Supreme Court rests upon sufficient and solid foundations, and that it deserves to be affirmed, for the reasons which the court gave for its conclusions. Nor is it correct to suppose that the property was condemned as a whole, as the proposition is refuted by the information, the monition, and the decree of condemnation. Specific lots being mentioned in the information and the monition, the accused party had no ground to suppose that any other portion of his real estate was embraced in the proceeding, and of course cannot be held to have acquiesced in its condemnation.

Certain other errors are assigned, but the court is of opinion that there is no error in the record.

Judgment affirmed.

BIEBINGER v. CONTINENTAL BANK.

A customer of a bank, who had deposited with it, as collateral security for his current indebtedness on discounts, the note of a third person secured by mortgage, and had withdrawn the same after maturity, for the purpose of foreclosure and collection, under an agreement to return the proceeds, or to replace the note by securities of equal value, purchased the mortgaged property at the foreclosure sale. At the request of the bank he deposited with it the deed he had received for the property. His indebtedness to the bank was then fully paid, and his dealings with it were temporarily suspended. He afterwards incurred debts to it; and on his becoming an adjudicated bankrupt, it filed its bill against his assignee, claiming an equitable lien in its favor upon the property. The bill contained no allegation of money loaned or debt created on the faith of the deposit of the deed, and it prayed for the specific performance of the agreement to replace the note withdrawn. *Held*, that the bank could not claim an equitable mortgage by such deposit.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

The case was submitted upon printed arguments by *Mr. J. O. Broadhead* for the appellant, and was argued orally by *Mr. Preston Player* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

The partnership firm of Yeager & Co., composed of Yeager and Crandall, were declared bankrupts Oct. 24, 1873, by the District Court of the Eastern District of Missouri, and the appellant duly appointed assignee. At the time of their failure Yeager & Co. had the legal title to a mill in Washington County, Illinois, and the Continental Bank, the appellee, filed its bill in chancery in the Circuit Court for the Eastern District of Missouri, against the assignee, alleging a large indebtedness of the bankrupts to the bank, for the security of which they were entitled to an equitable lien on the mill property in Illinois, above mentioned.

The facts as recited in the bill, out of which this lien is said to arise, are shortly these: For several years prior to 1871 the bankrupts had been doing business with the bank and had a line of discounts amounting generally to upwards of $50,000. There had also been on deposit with the bank as collateral security for this current indebtedness, among other paper of the same

kind, a note of Harriman & Co. to Yeager & Co. for $20,000, secured by a mortgage on the mill. This note being overdue and unpaid, Yeager & Co. applied to the bank for its delivery to them that they might foreclose the mortgage and collect the money, promising to pay the money if collected, or return to the bank whatever might be recovered in the foreclosure proceeding. The bank complied with this request, taking a receipt from Yeager & Co., which will be presently considered, dated Feb. 11, 1871. The mortgage was foreclosed, the property sold and bought in by Yeager & Co., who on the 6th of December, 1872, received in their own name the master's deed, which was duly recorded in Illinois, Dec. 20, 1872.

It is further alleged that shortly after this deed was made to Yeager & Co., it was, at the suggestion of the bank, delivered to it, and remained there until suspicion was excited that this deposit might not give them a lien on the property. A mortgage of the property to the bank was drawn up by its attorney, which one of the bankrupts promised should be executed, but which was not done; and matters remained in this condition when the bankruptcy proceeding was instituted, at which time, as the bill states, the bankrupts were indebted to them over $40,000.

Pending the litigation, the property was sold under a stipulation for $7,369.90, and the money paid into court; and for this sum a final decree was rendered in favor of the bank, from which this appeal is taken.

The assignee filed an answer, affirming ignorance of the facts alleged, and putting them in issue.

Most of the matters stated in the bill are supported by the evidence. The original pledge of the note and mortgage of Harriman, their withdrawal under a promise to return them or their proceeds, or to supply their places by some equivalent, seem fairly established. The purchase of the mill property under foreclosure proceedings, the deposit of the master's deed with the bank, and the indebtedness of Yeager & Co. to the bank at the time of their failure, are sufficiently proved. It would seem, under these circumstances, that the equitable lien asserted by complainants in their bill is established. But there is one fatal defect in the grounds on which this equity rests.

It is established, we think, by the evidence of complainant's witnesses, the officers of the bank, that every dollar of the indebtedness of Yeager & Co., existing at the time they withdrew the note and mortgage of Harriman, was fully paid off and discharged before they purchased the mill and received the title, and that a total interruption or suspension of loans or discounts took place in the summer of 1872.

It is impossible to hold, under these circumstances, that for a new debt made on a renewal of business relations the bank retained any lien on the note and mortgage which had been delivered up, or on the proceeds of the foreclosure sale. All that it stood for when so delivered up had been paid. By this payment the lien was released or discharged. To test this proposition let us suppose that when the master's deed came to the hand of the bankrupts there had been $10,000 due the bank, for which the original note and mortgage had been pledged to the bank, and the bank had demanded of Yeager & Co. a compliance with their promise to place in their hands the proceeds of the foreclosure. Can it be doubted for a moment that Yeager & Co. by paying the $10,000 due would have fulfilled their promise, and would have been released from any obligation to give a lien on the mill property?

The language of the receipt given by Yeager & Co. when the original note and mortgage were delivered to them shows this very clearly. It says: "Whereas, the subscribers being indebted to the National Loan Bank of St. Louis (afterwards the Continental) to a considerable amount on sundry notes and drafts, and having given said bank the following-described notes, secured by a deed of trust to secure said bank against loss, which have been delivered to said Yeager & Co. for the purpose of disposing of them," they agree if they do not return them in a reasonable time to replace them by others of equal value.

Now, what was secured by the notes and mortgage? Clearly the amount they then owed, evidenced and identified by notes and drafts then in existence. Not only is there here no allusion to security for any future transactions, but the parties acted on this idea; for during the two years they were engaged in foreclosing the mortgage, not only were all these notes and drafts paid, but there was a period of some months in which

the bankrupts owed the bank nothing, and in which there was no business transacted between them. This is sworn to clearly by the cashier of the bank, who says there was quite a number of months we did not see the bankrupts in the bank. Mr. Yeager, the bankrupt, testifies to the same thing; namely, that for a long time during this period the bank stopped taking paper from them, and it was all paid up. Mr. Crandall declares that none of the paper held by the bank at the date of their failure was for money discounted in 1872, and that they owed them nothing which they owed them in 1872. It is true the president of the bank suggested rather than affirmed that renewals ran into the present time, but refused on request to produce the books or transcripts from them to show this fact. The cashier, whose deposition was taken a second time, after full opportunity to examine the books, did not retract or modify his first declaration on this subject.

We are of opinion, therefore, that there was no lien for the bank's debt growing out of the original pledge of the note and mortgage of Harriman, or of any promise made when it was returned to Yeager & Co.

As regards the subsequent transactions, there are no allegations in the bill which would bring the case within the principle of an equitable mortgage by deposit of title-deeds, if that doctrine is recognized in the State of Illinois, where the land lies, or of Missouri, where the transaction occurred. There is no allegation of money loaned or debt created on the faith of the deposit of this deed. On the contrary, the allegation is that the bankrupts owe complainants over $30,000, which will be wholly lost unless the assignee be compelled to perform the contract of Feb. 11, 1871, which was the date of the receipt taken from Yeager & Co. when the note of Harriman was returned to them. And the prayer of the bill is for specific performance of that contract. No such suggestion is made in argument, and no proper foundation for relief on that ground being found in the bill, it is unnecessary to consider it here.

The decree of the Circuit Court will therefore be reversed, and the case remanded with directions to dismiss the bill; and it is

So ordered.

RAILROAD COMPANY v. MCKINLEY.

1. A. having in the State court recovered a judgment for $12,000 against a railroad company, the latter took the case to the Supreme Court of Iowa, where a judgment was rendered reversing that below and ordering a new trial. Immediately thereafter the company obtained and filed in the office of the clerk of the lower court, the court not being in session, a writ of *procedendo*, together with a petition under the act of March 3, 1875 (18 Stat 470), accompanied by the necessary bond, for the removal of the case into the Circuit Court of the United States. Within the sixty days allowed for that purpose by the laws of Iowa, but after the *procedendo* and petition had been filed, A. presented an application for a rehearing, and obtained from the Supreme Court an order suspending its judgment until the next term. The company then appeared and moved to dismiss the application, on the ground that, before it was presented, the case had been removed into said Circuit Court, and that, consequently, the Supreme Court had no jurisdiction thereof. That motion being denied and a rehearing had, A. consented to a reduction of the amount of his recovery to $7,000, whereupon judgment therefor was entered in the Supreme Court in accordance with its opinion. *Held*, 1. That the Supreme Court having, after reversing the judgment of the lower court, still retained jurisdiction of the cause for the purpose of a rehearing, the right of the defendant to a new trial had not been perfected when the petition for removal was filed. 2. That the subsequent judgment in the Supreme Court operated as a revocation of the order to the court below to grant a new trial, and consequently withdrew the case from under that petition. *Sed quære*, Is the filing of the petition and bond in the clerk's office, the court not being in session, sufficient, under any circumstances, to effect a removal?

2. The ruling in *Vannevar* v. *Bryant* (21 Wall. 41), that after one trial has been had in a State court, the right to another must be perfected before a demand can be made for the removal of the case to the Circuit Court of the United States, reaffirmed.

ERROR to the Supreme Court of the State of Iowa.

The facts are stated in the opinion of the court.

Mr. N. M. Hubbard for the plaintiff in error.

Mr. O. P. Shiras, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *Insurance Company* v. *Dunn* (19 Wall. 214), it was held that under the act of March 2, 1867 (14 Stat. 568), a cause could be removed from a State court to the Circuit Court after a trial and judgment in the State court, if before the removal the first judgment had been set aside or vacated, and the right

to a new trial perfected, and in *Vannevar* v. *Bryant* (21 Wall. 41), that after one trial the right to another must be perfected before a demand for removal could be made.

In this case there had been one trial and a judgment for McKinley, the plaintiff below, against the railroad company in the State court before the petition for removal was filed. Upon appeal to the Supreme Court of the State an order was obtained reversing this judgment, and remanding the cause for a new trial. As soon as this order of reversal was made, the company obtained from the clerk of the Supreme Court a writ of *procedendo*, and filed it in the clerk's office of the court below, that court not being at the time in session. This being done, the company filed in the clerk's office below, the court still not being in session, a petition under the act of March 3, 1875 (18 Stat. 470), accompanied by the necessary bond, for the removal of the cause to the Circuit Court of the United States.

Under the practice in Iowa, a petition for rehearing may be presented to the Supreme Court at any time within sixty days after the filing of the opinion in the case; and when presented, the court if in session, or a judge if in vacation, may order a suspension of the decision until the next term. In this case, before the expiration of the sixty days, but after the filing of the writ of *procedendo* and the petition for removal in the clerk's office below, a petition for rehearing was filed in the Supreme Court by the plaintiff, and an order suspending the decision until the next term obtained. At the next term the company appeared and moved to dismiss the petition for rehearing, on the ground that the cause had been removed to the Circuit Court before the petition was filed, and the Supreme Court had consequently no longer any jurisdiction. This motion was denied, and afterwards upon the rehearing, the plaintiff below having consented to a reduction of the verdict in his favor from $12,000 to $7,000, a judgment was entered in the Supreme Court for the reduced amount, in accordance with the opinion originally filed.

We think this brings the case within the rule as laid down in *Vannevar* v. *Bryant*. A right to a new trial had not been perfected absolutely when the petition for removal was filed.

The Supreme Court still retained jurisdiction of the cause for the purpose of a rehearing; and when it did rehear and set aside its former order of reversal, the case occupied the same position it would if the final judgment of that court had been the one originally entered. The subsequent judgment operated as a revocation of the order on the court below to proceed, and consequently took the case out from under the petition for removal.

We think, therefore, that the Supreme Court had jurisdiction of the cause when its final judgment was entered, and, consequently, that there is no error in the record which we can re-examine. The view we have taken of the case makes it unnecessary to consider whether the filing of the petition for removal in the clerk's office, the court not being in session, was sufficient of itself to effect a removal.

Judgment affirmed.

KLEIN v. NEW ORLEANS.

Lands held by a city for public purposes, or ground rents arising therefrom and forming a part of its public revenues, are not subject to seizure and sale on execution.

ERROR to the Circuit Court of the United States for the District of Louisiana.

John Klein, having recovered a judgment for $89,000 against the city of New Orleans in the Circuit Court of the United States for the District of Louisiana, caused an execution to issue thereon. The marshal thereupon seized certain real estate belonging to the city, consisting of "two squares of ground which had formerly constituted the easterly bank of the Mississippi River, but which, by the gradual accretion of said easterly bank, had ceased to constitute the bank of the river, but which were now used by the public for wharf and levée purposes, said squares forming a portion of the land known as the 'Batture property,'" together with certain annual ground rents therefrom arising and belonging to the city.

On motion of the city, a rule on the plaintiff to show cause why the seizure should not be dissolved and set aside was issued.

At the hearing, the court being of "opinion the said squares were public property which the city could not alienate without the permission of the General Assembly of the State of Louisiana, and that the said ground rents formed a portion of the public revenues of the said city," and were, therefore, not subject to Klein's execution, made the rule to dissolve the seizure absolute, and ordered the marshal to release the property.

Klein thereupon brought the case here

Mr. J. Q. A. Fellows for the plaintiff in error.

Mr. B. F. Jonas, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We must take the facts of this case as they are stated in the bill of exceptions, and cannot look into the evidence. The questions to be settled are: 1. Whether the lands levied on are subject to seizure and sale under execution against the city; and, 2. Whether the ground rents are liable in the same way.

This depends on the facts. If the lands are held by the corporation for public purposes, and the ground rents are part of the public revenues, it is well settled that they cannot be levied on or sold. Dillon, Mun. Corp., sects. 64, 446. Municipal corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.

The bill of exceptions shows that the lands consisted of "two squares of ground which had formerly constituted the easterly bank of the Mississippi River, but which, by the gradual accretion of said easterly bank, had ceased to constitute the bank of the river, but which were now used by the public for wharf and levee purposes, said squares forming a portion of the land known as the 'Batture property.'" From this it must be

inferred that they were held for the use of the public. In a city where business is carried on by water, a public wharf is as much a public necessity as a public street or highway. If the land in this case had still continued to be the bank of the river, and used and improved as a public landing, it certainly could not have been subject to sale on execution against the city; but we think a simple extension of its surface does not change its character. If it continues to be used as it was before, it is still public wharf or levee property. It matters not that charges may have been made by the city for wharfage. That would be nothing more than a proper governmental regulation. A street extending to navigable waters and used for wharf purposes does not cease to be public property because a charge is made for its use in that way. The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality. Upon the facts as stated by the court below, we think the lands levied upon were not subject to seizure and sale.

As to the ground rents, it was decided by the Supreme Court of Louisiana, in *New Orleans & Carrollton Railroad Co.* v. *Municipality No.* 1 (7 La. Ann. 148), that "in authorizing the mayor and city council (of New Orleans) to sell property on perpetual ground rent, the legislature established a legal destination of the rents, as a portion of the public revenue of the city, to enable the municipal authority to exercise its powers of police and government. These rents, therefore, cannot be sold under execution against the municipality." There is nothing in the bill of exceptions to show that the rents levied upon in this case were in any respect different from those under consideration in that. We must presume, therefore, that they are the same.

Judgment affirmed.

UNITED STATES v. FORT SCOTT.

Sect. 16 of a statute of Kansas, approved March 2, 1871, authorized cities of the second class to pass ordinances imposing taxes for general revenue purposes on all the taxable property within their limits, and make specified public improvements; and provided that, to meet the cost of "paving, macadamizing, curbing, and guttering of streets," assessments should be made on all the lots or pieces of ground extending along the street the distance to be improved, according to their assessed value. Sect. 17 provided that these assessments should be known as "special assessments for improvements," and be levied and collected as one tax, in addition to the general taxes; but it empowered the mayor and council to issue for the cost of such improvements bonds payable at the expiration of specified terms, and make assessments in each year, to pay the principal and interest maturing thereon during the fiscal year, upon the taxable property chargeable therewith, "as provided in the last part of the preceding section." Other sections authorized the city council to provide, when necessary, for the issue of bonds, for the purpose of funding any and all indebtedness of the city, and required it to make provision, by levying taxes payable in cash, for a sinking-fund for the redemption at maturity of "the bonded indebtedness of the city," and to levy annually taxes payable in cash on all taxable property within the city in addition to other taxes, and in amount sufficient to pay the interest and coupons, as they became due, on all the bonds of the city. Under this statute the city council of F., a city of the second class, passed an ordinance for grading, paving, guttering, and macadamizing one of its streets within prescribed limits, and for paying the cost of the work by the issue of special improvement bonds of the city, signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer. The ordinance provided that the bonds should be paid, principal and interest, solely from special assessments, to be made upon and collected from the lots and pieces of ground upon the street the distance improved, in the manner provided in sects. 16 and 17 of the above statute. Each bond issued under this ordinance states in its margin that it is issued in accordance with sects. 16 and 17 of the statute, and in pursuance of an ordinance of the city of F., entitled an ordinance ordering the grading, curbing, guttering, and macadamizing of streets, and upon its face that it is a special improvement bond of the city of F., Kansas. The city, for value received, thereby acknowledges itself to owe, and promises to pay to the holder the amount thereof, and each bond is indorsed with the certificate of the auditor of State that it was regularly and legally issued. A., the holder for a valuable consideration of some of these bonds before they matured, brought suit against the city, and recovered judgment for the amount thereof in the ordinary form, except that the court added, that it "be enforced and collected pursuant to law, in such case made and provided." Said judgment not being paid, A. sued out a writ of *mandamus* to compel the levy of a tax. The court below held that the levy must be confined to special assessments upon the property benefited and improved. *Held*, that his remedy was not so confined, and that the city was bound to impose, in satisfaction of the judgment, a tax upon all the taxable property within her limits.

ERROR to the Circuit Court of the United States for the District of Kansas.

A statute of Kansas, approved March 2, 1871, confers upon cities of the second class authority to enact ordinances for certain defined purposes. By the sixteenth section authority is given: 1st, to levy and collect taxes for general revenue purposes, not to exceed five mills on the dollar in any one year, on all the real, mixed, and personal property within their limits, taxable according to the laws of the State; 2d, to open and improve streets, avenues, and alleys, make sidewalks, and build bridges, culverts, and sewers, the cost of which may be met by assessments in the following manner, to wit: *first*, for opening, widening, and grading all streets and avenues, for building bridges, culverts, and sewers, and for footwalks across streets, assessments shall be made on all taxable property within the corporate limits of the city, not exceeding five mills on the dollar in any one year; *second*, for making and repairing sidewalks, assessments shall be made on all lots and pieces of ground abutting on the improvement, according to front feet; *third*, for paving, macadamizing, curbing, and guttering streets, alleys, and avenues, and excavating, grading, and filling same, and for improvements of the squares and areas formed by the crossing of streets, assessments shall be made on all lots and pieces of ground to the centre of the block extending along the street or avenue, the distance improved or to be improved, according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon, which value must be ascertained by three disinterested appraisers, appointed by the mayor and council.

By the seventeenth section it is declared that assessments made pursuant to the third clause of the second subdivision of the preceding section shall be known as "special assessments for improvements," and, except as thereinafter provided, shall be levied and collected as one tax, in addition to taxes for general revenue purposes. But the mayor and council are empowered to issue bonds of the city for the costs of paving, macadamizing, curbing, and guttering streets and avenues, and excavating, grading, and filling for same, to be made payable as follows: one-third of the aggregate amount of bonds of any

issue in one year, one-third in two years, and one-third in three years, with interest from date, at the rate of ten per cent per annum, payable annually. "And for the payment of said bonds, assessments shall be made in each year to pay the principal and interest maturing on said bonds during said fiscal year, upon the taxable property chargeable therewith, as is provided in the third clause of the second subdivision of the preceding section, and such tax shall be certified by the city clerk to the county clerk, and placed upon the tax-roll for collection, subject to the same penalties and collected in like manner as other taxes." Laws of Kansas, 1871, p. 148.

The eighteenth section provides that "the council may appropriate money and provide for the payment of the debts and expenses of the city, and, when necessary, may provide for issuing bonds for the purpose of funding any and *all* indebtedness now existing or hereafter created of the city, now due or to become due." And for the payment of any coupons of bonds issued under that section the council is required to levy taxes, payable in cash, on all the property in the city, in addition to other taxes. Id.

The nineteenth section declares that the council may provide for making any and all improvements of a general nature in the city, and to pay for same may, from time to time, borrow money and issue bonds. In the payment of such bonds, with their interest coupons, at maturity, the council is required to levy taxes, payable in cash, on all taxable property within the city, in addition to other taxes. Bonds authorized by that section cannot, however, be issued unless the council is previously instructed to do so by a majority of all the votes cast at an election held for that purpose.

By sect. 21 the council is required "to make provision from time to time for a sinking-fund to redeem at maturity the bonded indebtedness of the city," the taxes levied for that purpose being payable only in cash.

By sect. 22 the council is authorized and required to levy annually taxes, payable in cash only, on all the taxable property within the city, in addition to other taxes, and in amount sufficient to pay the interest and coupons as they become due

"on *all* the bonds of the city" then (1871) issued or thereafter to be issued by the city.

These sections seem to be the only portions of the statute of March 2, 1871, which have any direct bearing upon the question presented for consideration.

In the year 1872, the city council of Fort Scott, being a city of the second class, by ordinance required one of its streets to be graded, paved, guttered, and macadamized, within prescribed limits, the cost of the work to be paid for in bonds of the city, to be registered and classified as special improvement bonds, and which might be made payable in New York. The ordinance provides that the bonds "shall be paid, principal and interest, solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon and extending along the street the distance improved, in the manner provided in sects. 16 and 17 of an act of the legislature of Kansas relating to the powers and government of cities of the second class, approved March 2, 1871."

In accordance with that ordinance, bonds with coupons attached were issued and negotiated to the amount of several thousand dollars.

Upon the margin of each bond is this statement: "Issued in accordance with sects. 16 and 17 of an act of the legislature of Kansas, entitled an act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the general statutes of 1868, approved March 2, 1871, and in pursuance of an ordinance of the city of Fort Scott, entitled an ordinance ordering the grading, curbing, guttering, and macadamizing a part of Wall Street." Upon each bond also was indorsed the official certificate of the auditor of the State, to the effect that such bond "had been regularly and legally issued, that the signatures thereto were genuine," and that the bond had been duly registered in his office in accordance with the statute of March 2, 1872.

The Concord Savings Bank having become the holder and owner, for a valuable consideration and before maturity, of some of these bonds, and failing to obtain payment, sued the city, and recovered judgment for the amount thereof in the Circuit Court of the United States for the District of Kansas.

The judgment is in the ordinary form, except that the court adds: "And it is further ordered and adjudged that the judgment now here rendered be enforced and collected pursuant to law in such case made and provided."

Subsequently the bank sued out an alternative writ of *mandamus*, commanding the city council to levy and collect a sufficient tax upon all the taxable property within the city to pay the judgment, interest, and costs. But, upon demurrer, the court below held that the relator was only entitled to a levy of special assessments upon the property benefited and improved, and upon that ground the writ was quashed and the relator's information dismissed. The relator then sued out this writ of error.

Mr. J. D. McCleverty for the defendant in error, in support of the judgment below.

The court, in rendering the original judgment against the city, annexed to it a special provision, which had been approved in *County of Cass* v. *Jordan*, 95 U. S. 373, and *County of Cass* v. *Johnson*, id. 360. The judgment, therefore, should not be construed to be an absolute one, rendering the city liable at all events to pay the same, and entitling the relator to the levy of a general tax, inasmuch as, by the provisions of the statute and the ordinance under which the bonds were issued, the means of paying them were to be derived exclusively from the taxable property chargeable therewith. The relator was fully cognizant of the fact when he purchased these bonds, as he had full notice by the recitals upon their face. While the city is bound by these recitals, he is equally so. He is therefore affected with notice of the ordinance, as it was necessary to authorize the issue of the bonds. The provision touching this special tax for the payment of them was a part of the contract, which cannot be modified or repealed, and it was that provision which the court obviously had in view in giving to the judgment its exceptional form.

The uniform ruling has been, that where a liability created by law is payable out of a special fund, that fund can alone be resorted to for payment. *McCullough* v. *The Mayor, &c. of Brooklyn*, 23 Wend. (N. Y.) 458; *Lake* v. *Trustees of Williamsburgh*, 4 Den. (N. Y.) 520; *Hunt* v. *City of Utica*, 18 N. Y. 442,

Eilert v. *The City of Oshkosh*, 14 Wis. 586; *Whalen* v. *La Crosse*, 16 id. 271; *Silkman* v. *Milwaukee*, 31 id. 555; *Finney* v. *Oshkosh*, 18 id. 209.

In Michigan, it is the rule that the corporation is only liable for the special assessment. *The People* v. *Township of Zilwaukie*, 10 Mich. 274; *Goodrich* v. *Detroit*, 12 id. 279; *Bank* v. *The City of Lansing*, 25 id. 207. See also *City of New Albany* v. *Sweeney*, 18 Ind. 245; *Casey* v. *Leavenworth*, 17 Kan. 189.

Mr. James D. Campbell, contra.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

The vital question upon this writ of error is, whether the city is under a legal obligation to impose, in satisfaction of the relator's judgment, a tax upon all the taxable property of the city. If so, the judgment dismissing the information should be reversed; otherwise, it must be affirmed.

It is contended by counsel for the plaintiff that as the judgment for the debt has never been modified or reversed, the city is estopped, in this proceeding, to say that the relator was entitled only to a levy upon the property specially benefited. A determination of that question does not seem absolutely necessary in view of our conclusions upon other issues presented in the case. We therefore waive its consideration, and proceed to an examination of the statute of March 2, 1871, under which the bonds were issued. We are the more inclined to pursue this course because of his frank concession, that perhaps the purpose of the learned judge who framed the order of dismissal was to reserve the real question in controversy for determination when proceedings for *mandamus* should come before him.

In our examination of the statute of March 2, 1871, we are impressed with a strong conviction that the legislature intended to confer upon cities coming within its provisions the amplest authority, not only to incur obligations for all legitimate municipal purposes, but to meet promptly every obligation thus incurred. Unusual care seems to have been taken to guard the financial credit of such cities by provisions which, if enforced would not only give confidence to creditors, but render municipal repudiation impossible. This care is manifested in the

section which requires the council to establish a sinking-fund for the redemption, at maturity, of "the bonded indebtedness of the city," that fund to be supplied by taxes, payable only in cash. It is further shown in the section which both authorizes and requires sufficient taxation annually on all taxable property within the city to meet the interest as it matures "on *all* the bonds of the city." It is still further indicated in the section which declares that the council "may . . . provide for the payment of the debts and expenses of the city." No express restriction is imposed as to the mode in which such provision may be made, except that, when necessary, "any and all indebtedness of the city" may be met by issuing funding bonds, the interest upon which may be paid by taxation "on all the property of the city, in addition to other taxes." A faithful exercise of the powers thus conferred would seem to be sufficient to secure the prompt satisfaction of any municipal indebtedness incurred in accordance with the provisions of the statute of 1871. That the bonds for the amount of which the relator obtained judgment constitute a "debt," or a portion of "the bonded indebtedness" of the city, within the meaning of the statute, cannot well be doubted. The ordinance which required the improvements in question in terms directs that the cost thereof "shall be paid for in the bonds of the city," to be signed by the mayor, attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer. Further, each bond declares upon its face that it is a "special improvement bond of the city of Fort Scott, Kansas;" and that the city, "for value received, acknowledges itself to owe, and promises to pay to the holder" the amount thereof. Still further, the statute under which the ordinance was framed authorizes the council to pay the cost of such special improvements by issuing "the bonds of the city." Finally, the bonds were negotiated by the city authorities, by whom the proceeds were received and expended under the direction of the council. They constitute, therefore, in every just sense, debts which the city, in its corporate capacity, is under a statutory and legal obligation to provide for in some effectual, substantial manner.

But, in behalf of the city, it is urged that the holder of these bonds must, by the terms of the statute, and the ordinance of

Jan. 22, 1872, look for payment exclusively to assessments upon the property specially improved and benefited. It is contended that such was the purpose of the city, of which the purchaser had constructive notice in the reference, in the marginal statement upon the bonds, both to sects. 16 and 17 of the act of March 2, 1871, and to the ordinance passed by the council. To that interpretation of the contract we cannot yield our assent. It is true that sect. 17 declares that "for the payment of said bonds" assessments shall be made "upon the taxable property chargeable therewith;" that is, "on all lots and pieces of ground to the centre of the block, extending along the street or avenue, the distance improved." But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with *its* promise to pay the bonds, with interest, at maturity. As between the city and its tax-payers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock* v. *Galveston*, 96 U. S. 341.

The main difficulty comes from the peculiar phraseology of the city ordinance prescribing the source from which the means for the payment of the bonds should be obtained. The statement in the ordinance that the bonds "shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved," should be regarded only as an expression, in emphatic terms, of the purpose and duty of the city, as between all its tax-payers, to impose the cost of the proposed improvements upon the property specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improve-

ment was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is, that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood.

In this case, it is alleged by the city that the special assessments required by the seventeenth section of the act of 1871 were duly made before the maturity of the bonds, and that all amounts collected in that mode have been promptly paid over by the city to holders of such bonds. But the unquestioned fact remains, that the bonds, with some interest, held by the relator, were not met at maturity as the city agreed that they should be. They are still unpaid. The special assessments made have, from some cause not explained in the auswer of the city, proven wholly insufficient. Nor does it appear that they will ever prove sufficient for the payment of the relator's judgment. The corporate authorities repudiate all legal obligation upon the part of the city to provide payment in any other mode or from any other source, a position which we hold to be untenable and in violation of a plain duty imposed by statute. We are of opinion that the council has the power, under this statute, to provide for the payment of the relator's judgment

by taxation upon all the taxable property within the city, and such should have been the judgment of the court below. A discharge of that duty will in nowise interfere with the right of the council to reimburse the city, if that be now possible, for all amounts thus paid, out of special assessments upon the property primarily chargeable with the cost of the work on account of which the bonds were issued.

The judgment will be reversed, with directions for further proceedings in conformity with this opinion; and it is

So ordered.

HARRIS v. MCGOVERN.

1. Continuous adverse possession of lands in California for five years bars an action of ejectment, if the plaintiff or those under whom he claims were under no disability when the cause of action first accrued.
2. When the Statute of Limitations begins to run, no subsequent disability will arrest its progress.

ERROR to the Circuit Court of the United States for the District of California.

This is ejectment, commenced Jan. 10, 1870, by Edward H. Harris, Isaac H. Shimer and Letitia his wife, against John McGovern and others. A jury having been waived by written stipulation, the court tried the issue, and found the following facts: —

1. The land in controversy is known as one hundred vara lot, No. 19, of the Laguna survey, and is situated within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the fifteenth day of April, 1851; but lies west of Larkin Street and northwest of Johnson Street, as they existed prior to and at the time of the passage of certain ordinances by the common council of said city, which were afterwards ratified by an act of the legislature of said State, entitled "An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11, 1858. Said land is also within the

boundaries designating the lands to which the right and title of the United States were relinquished and granted to said city and its successors by the act of Congress entitled "An Act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864.

2. On the twenty-fifth day of September, 1848, T. M. Leavenworth was alcalde of the pueblo or town of San Francisco, which was subsequently incorporated as the city of San Francisco, and on said day, as such alcalde, he made a grant in due form of the land in controversy to a party designated in said grant by the name of Stephen A. Harris, which grant was duly recorded in the official book of records of grants kept by said alcalde, and now constituting a part of the records of the office of the recorder of deeds of the city and county of San Francisco.

3. At the date of said grant there was residing at said pueblo or town of San Francisco a man named Stephen A. Harris, and another man named Stephen Harris. The said grant was intended for and delivered to said Stephen Harris, and not said Stephen A. Harris; and said Stephen Harris acquired, by virtue of said acts, all the title that passed or was conveyed by the said grant.

4. The said Stephen Harris left California in 1850, and never returned. He went to New Jersey, where he remained several years, then removed to Illinois, where he died on Nov. 5, 1867, leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children, and a portion of his heirs-at-law, and who at the time of the decease of said Stephen Harris were minors. Said will has been duly admitted to probate in the State of Illinois, but has never been presented to or admitted to probate by any probate or other court in the State of California.

5. There was no evidence tending to show that said Stephen Harris or said plaintiffs, or either of them, or any person claiming under them or any or either of them, ever improved said land, or ever was in the actual possession or occupation of said land or of any part thereof.

6. On May 1, 1854, Stephen A. Harris, at San Francisco, by deed in due form and duly recorded, conveyed said land to one

Blackstone. All the right, title, and interest thus acquired by said Blackstone, by sundry mesne conveyances in due form and duly recorded, became on June 22, 1865, vested in said defendants for a valuable consideration paid, and without notice of the claim of Stephen Harris or said plaintiffs, or either of them.

7. In the spring of 1864 one Jenkins, one of said grantors of defendants, took actual possession of said land, claiming title under one of said mesne conveyances from said Blackstone, fenced and occupied said lands; and he and his several grantees, down to and including said defendants, have since said spring of 1864 down to the present time been in the actual, peaceable, open, continuous, exclusive, and adverse possession of said land, claiming title thereto in good faith against all the world, under said several conveyances from Stephen A. Harris, Blackstone, and their grantees.

8. There was no evidence tending to show that any party was in the actual occupation or possession of said land or any part thereof on the first day of January, 1855, or at any time between that date and the first day of July, 1855.

9. The plaintiff, Edward H. Harris, attained his majority in March, 1869, and Letitia Harris Shimer, the other plaintiff, her majority in May, 1868.

The court thereupon concluded as matter of law, —

1. That the adverse possession of the defendants' grantors having commenced in the spring of 1864, the Statute of Limitations began to run as early at least as July 1, 1864, the date of the act of Congress mentioned in the first finding of facts, at which time the title of the city of San Francisco to its municipal lands, situate within the boundaries of the charter of 1851, became perfect.

2. That the cause of action having accrued, and the Statute of Limitations having commenced to run during the lifetime of Stephen Harris, its running was not interrupted by his subsequent decease, and the descent of such right of action to the plaintiffs while minors and under a disability to sue.

3. That the defendants and their grantees having been in the continuous adverse possession of the lands for a period of more than five years subsequent to July 1, 1864, and before the com-

mencement of this action, and there being no disability to sue when the cause of action first accrued, the action is barred.

Judgment having been rendered for the defendants, the plaintiffs sued out this writ of error.

Mr. D. William Douthitt for the plaintiff in error.
Mr. S. M. Wilson, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Actual title to the lot in controversy is claimed by the plaintiffs as devisees and heirs of Stephen Harris, deceased, by virtue of an ordinance of the city, which, as they allege, was subsequently ratified by an act of Congress. Opposed to that, the theory of the defendants is that the city ordinance granted the lot to Stephen A. Harris, under whom they derive title, and that inasmuch as they have been in the open adverse possession of the same, claiming title, for more than five years, the title of the plaintiffs, if any they or their testator ever had, is barred by the Statute of Limitations.

Possession being in the defendants, the plaintiffs brought ejectment, and the defendants appeared and pleaded as follows: 1. The general issue. 2. That they were seised in fee-simple of the premises. 3. That the title and right of possession of the plaintiffs were barred by the Statute of Limitations.

Pursuant to the act of Congress, the parties waived a jury and submitted the evidence to the court. Special findings were filed by the judge presiding, with his conclusions of law, as exhibited in the record. Hearing was had, and the court rendered judgment in favor of the defendants, and the plaintiffs sued out the present writ of error.

Three errors are assigned, as follows: 1. That the court erred in the conclusion of law that the Statute of Limitations began to run as early as July 1, 1864, as found in their first conclusion of law. 2. That the court erred in the conclusion that the defendants were in possession of the premises for more than five years subsequent to the time when the Statute of Limitations commenced to run. 3. That the court erred in their fourth conclusion of law, that the defendants were entitled to judgment.

Actions of the kind cannot be maintained in that State, unless

it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within five years before the commencement of such action. Stats. Cal. 1863, 326; 2 Code, sect. 318.

From the findings of the Circuit Court it appears that the lot in controversy is within the corporate limits of the city, and that it is situated west of Larkin Street and northwest of Johnson Street, as they existed prior to the passage of the ordinances, which were afterwards ratified by the act of the legislature of the State. Stats. Cal. 1858, 53. Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to the city and its successors. 13 Stat. 333, sect. 5.

Prior to the incorporation of San Francisco the locality was known as the pueblo or town by that name; and the findings of the court show that on Sept. 25, 1848, the alcalde of the pueblo made a grant in due form of the land in controversy to a party designated in the instrument by the name of Stephen A. Harris, which grant was duly recorded in the official book of records kept for that purpose; that at that date there was a man residing in that pueblo by the name of Stephen A. Harris and another man by the name of Stephen Harris; that the grant was intended for and delivered to the latter and not to Stephen A. Harris; and that Stephen Harris, to whom the grant was delivered, acquired all the title that passed or was conveyed by the grant of the alcalde. It also appears that Stephen Harris, two years later, left California, and that he never returned to that State; that he went to New Jersey, where he remained several years, and then removed to Illinois, where, on the 5th of November, 1867, he died, leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children.

By the fifth finding of the court it appears that there was no evidence introduced tending to show that the deceased, or the plaintiffs, or any person claiming through or under them, ever improved the land, or was ever in the actual possession or occupation of the land or any part of the same. On the other hand, it appears that Stephen A. Harris, May 1, 1854, conveyed the land to the person named in the sixth finding, by deed in

due form, which was duly recorded, and that all the right, title, and interest thus acquired by the grantee by sundry mesne conveyances subsequently vested in the defendants for a valuable consideration, without notice of the claim of the plaintiffs or their testator.

There was no evidence to show that any party was in actual occupation of the land Jan. 1, 1855, or any time between that date and the first day of July of the same year; but the seventh finding of the court shows that one of the grantors of the defendants, in the spring of 1864, took actual possession of the land, claiming title under one of the said mesne conveyances, and that he fenced and occupied the lands, and that he and his several grantees, including the defendants, have since that time to the present been in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith against all the world, under the said several mesne conveyances.

Sect. 5 of the act of Congress of July 1, 1864, relinquished to the city all the right and title of the United States to the lands within the corporate limits of the city, as defined in the act of incorporation passed by the State legislature, and of course the title of the city to those lands became absolute on that day. *Lynch* v. *Bernal*, 9 Wall. 316; *Montgomery* v. *Bevans*, 1 Sawyer, 653; 13 Stat. 333.

Infancy is not set up in this case, and if it were, it could not avail the plaintiffs, as the ninth finding of the court shows that the minor plaintiffs arrived at full age more than a year before the suit was commenced.

Lands lying west of Larkin Street and southwest of Johnson Street were relinquished to the possessors, subject to the right of the city to take possession of the same if wanted for public purposes, without compensation; but the lot in controversy is not within that reservation, as the first finding of the court shows that it is situated northwest of Johnson Street.

Appended to the findings of fact are the conclusions of law pronounced by the Circuit Court. They are as follows: 1. That the adverse possession of the grantors of the defendants commenced in the spring of 1864, and that the Statute of Limitations began to run as early at least as the first day of July of

that year, when the title of the city to the municipal lands within its boundaries became perfect under the act of Congress, to which reference has already been made.

Authorities to show that the facts stated in the seventh finding of the court amount to an adverse possession of the lot in controversy, within the meaning of the State statute, are quite unnecessary, as the proposition is too plain for argument. Angell, Limitations (6th ed.), sect. 394; *Green* v. *Liter*, 8 Cranch, 229.

Cases frequently arise where the property is so situated as not to admit of use or residence, and in such cases neither actual occupation, cultivation, nor residence are absolutely necessary to constitute legal possession, if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Ewing* v. *Burnet*, 11 Pet. 41; *Jackson* v. *Howe*, 14 Johns. N. Y. 405; *Arrington* v. *Liscom*, 34 Cal. 365; *Proprietors of the Kennebec Purchase* v. *Skinner*, 4 Mass. 416.

Apply the rule to the case which the foregoing authorities establish, and it is clear that the first conclusion of law adopted by the Circuit Court is correct, as the seventh finding of facts shows that the defendants, from the date of the act of Congress confirming the title of the city to her municipal land to the date of the judgment, were in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith against all the world, which is certainly a bar to the plaintiffs' right of action under the statute of the State.

Nor is there any valid objection to the second conclusion of law adopted by the Circuit Court, which was that the cause of action having accrued and the Statute of Limitations having commenced to run during the lifetime of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue.

Decided cases of a standard character support that proposition, and the court is of the opinion that it is correct. *Jackson*

v. *Moore*, 18 Johns. (N. Y.) 513; *Jackson* v. *Robins*, 15 id. 169; s. c. 16 id. 537; *Fleming* v. *Griswold*, 3 Hill (N. Y.), 85; *Becker* v. *Van Valkenburgh*, 29 Barb. (N. Y.) 319.

When the statute once begins to run, says Angell, it will continue to run without being impeded by any subsequent disability. *Smith* v. *Hill*, 1 Wils. 134; Angell, Limitations (6th ed.), sect. 477; *Currier* v. *Gale*, 3 Allen (Mass.), 328; *Durouse* v. *Jones*, 4 T. R. 301; *Jackson* v. *Wheat*, 18 Johns. (N. Y.) 40; *Welden* v. *Gratz*, 1 Wheat. 292.

Decisive support to the third conclusion of the Circuit Court is also derived from the authorities cited to sustain the second. Continuous adverse possession of the land, say the court in their third conclusion, having been held by the defendants and their grantors for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, the action is barred, as there was no disability to sue when the cause of action first accrued.

Suppose that is so, then clearly the defendants were entitled to judgment, and there is no error in the record.

Judgment affirmed.

GORDON *v.* GILFOIL.

A. gave his promissory notes, payable Jan. 1, 1868, and Jan. 1, 1869, and to secure the payment thereof executed a mortgage on certain lands in Louisiana, which he had held in community with his wife, then deceased. In proceedings upon an order of seizure and sale, the holder of the note purchased the property, and brought in a State court a petitory action therefor and for rents and profits. A. answered, setting up the nullity of the proceedings, by reason of the non-compliance by the sheriff with the requirements of the statute. B., his son, intervened, setting up such nullity, and also claiming one-half of the property as the heir of his deceased mother. A. having died, the plaintiff filed a supplemental petition against B., which contained no prayer for a personal judgment against him, nor did it set up the debt itself as a ground of claim or action. Judgment was rendered in favor of B., upon the ground that he was the owner of an undivided half of the property, and that the sale by the sheriff was void, because he had never had the property in his possession. The holder of the notes thereupon, Oct. 19, 1876, brought suit in the Circuit Court of the United States against B., charging him on the notes as universal heir of A. averring that he was liable for the debt, because as such heir he had taken

possession of the estate and property of A., and praying a decree for the debt, with mortgage lien and privilege out of the mortgage property. B. set up the prescription of five years, and averred that the order of seizure and sale was a merger of the original debt, and that the executory proceedings were still pending; that he had taken possession of one half of the property as heir of his mother, and of the other half as the beneficiary heir of his father; but denied that such possession made him liable for the debt. He furthermore set up the said judgment as a bar. *Held*, 1. That the order of seizure and sale did not merge the debt, but that it was a judicial demand, continuing in operation until rendered effective by a valid sale of the property, and that the plea of prescription could not, therefore, be sustained. 2. That the pendency of a suit in a State court does not abate a suit upon the same cause of action in a court of the United States. 3. That the said judgment is not a bar to this suit. 4. That under articles 371 and 977 of the Civil Code of Louisiana, if a husband after the death of his wife mortgages community property for his debt, and afterwards dies while their son and heir is still a minor, but after he has been emancipated, the latter does not render himself liable for the debt as universal heir of his father, by simply taking possession of the property and receiving to his own use the rents and profits thereof. 5. That the complainant is entitled to a decree for the sale of one undivided half of the mortgaged property, to pay said notes and interest.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Henry B. Kelly and *Mr. Henry L. Lazarus* for the appellant.

Mr. Samuel R. Walker for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

In January, 1867, Patrick Gilfoil, of Madison Parish, La., being indebted to Gordon & Castillo, of New Orleans, in the sum of $4,500, or thereabouts, gave them his promissory notes therefor, payable on the 1st of January, 1868, and 1st of January, 1869, secured by a mortgage on his cotton plantation in the parish of Madison. The property was in fact community property, and Gilfoil's wife had died the year preceding this transaction, leaving a minor son, James H. Gilfoil, as her only heir-at-law. The notes not being paid, Mary Cartwright Gordon, the holder thereof, in February, 1869, filed a petition in the District Court for the parish of Madison for an order of seizure and sale of the mortgaged premises, and executory process was issued accordingly, and on the 3d of July, 1869, the sheriff sold the property to Mrs. Gordon for the sum of

$600, and executed to her a deed therefor; but no possession was delivered.

In January, 1872, Mrs. Gordon instituted a suit in the District Court of the parish against Patrick Gilfoil, to recover the land, and the rent thereof from the time of the sheriff's sale. This suit was known as No. 772.

To the petition in this suit Patrick Gilfoil filed an answer containing a general denial, and specially denying that the plaintiff had any good and valid title. By a supplemental answer, he particularized the cause of nullity of plaintiff's title to be, that the executory proceeding was in every respect illegal; that no service of notice of the order of seizure and sale, nor any notice of seizure, nor any appraisement, was legally made, nor any of the forms of law observed by the sheriff in making the sale; and that no due and valid advertisement was made.

Patrick Gilfoil died Oct. 2, 1872. Before his death, in May, 1872, his son, James H. Gilfoil, by petition intervened in the suit, claiming that the property was community property, and that he was the legal owner of one undivided half thereof by inheritance from his deceased mother; and praying judgment accordingly.

In April, 1874, Mrs. Gordon filed an amended and supplemental petition, alleging the death of Patrick Gilfoil, and that James H. Gilfoil had possessed himself of the property, claiming to be the legitimate heir of Patrick, and refused to deliver possession thereof. Wherefore the petitioner prayed that James H. Gilfoil be made a party to the suit; and that petitioner recover of him judgment as prayed for in her original petition, and the rents since the death of Patrick Gilfoil; and for general relief. She also filed an answer to James H. Gilfoil's petition of intervention.

James H. Gilfoil filed an answer to the supplemental petition, as well as to the original petition, denying all the allegations thereof, and specially denying any legal sale of the land. By a further answer he pleaded prescription of three and five years, and prescription generally; alleging that the debt was prescribed when Patrick Gilfoil acknowledged it.

The case having gone to trial in November, 1874, the District

Court decided in favor of the plaintiff, Mrs. Gordon, as to one half of the property, and as to the other half, decided in favor of the defendant; but on appeal to the Supreme Court of Louisiana, the judgment in favor of the plaintiff was reversed, the court deciding that the sale by the sheriff under the executory process was void, because the sheriff at no time had the mortgaged property in his possession. They held that an actual corporal possession of property seized must take place in order to make a sheriff's sale valid, and to render a compliance with the law complete; that the sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly authorized by him. The judgment in favor of the defendant was affirmed, and judgment was given in his favor generally. The case is reported in 27 La. Ann. 265.

This judgment of the Supreme Court was rendered March 8, 1875.

Thereupon, on the 19th of October, 1876, the present suit was commenced in the Circuit Court of the United States, against James H. Gilfoil, charging him on the notes as universal heir of Patrick Gilfoil, and praying judgment for the amount of the debt, with mortgage lien and privilege out of the mortgaged premises.

The defendant pleaded as follows: "1. That the said petition discloses no cause of action against this respondent. 2. That this court is without jurisdiction, for the reason that said plaintiff, having elected to sue in the court of the State of Louisiana, the thirteenth district court, in and for the parish of Madison, and jurisdiction of this cause has already vested in the said State court. 3. That the obligations sued on are prescribed by the lapse of more than five years."

The court, upon argument, ordered that the plea of prescription be referred to the merits, and that the plaintiff be allowed to amend her petition by setting up the facts upon which she relied to interrupt prescription.

This she did by setting up the order of seizure and sale; and she claimed that James H. Gilfoil was liable for the debt, because he, as heir of Patrick Gilfoil, took possession of his estate and property.

The defendant filed an answer, denying the supplemental petition generally, denying the plaintiff's ownership of the notes, and setting up the order of seizure and sale as a merger of the original debt; and further, that as said proceedings had never been discontinued, the Circuit Court was without jurisdiction.

By a supplemental and amended answer he set up his ownership in one undivided half of the mortgaged property as heir of his mother; and as to the other half he averred that, as administrator and sole beneficiary heir of his father (Patrick Gilfoil), he became possessor thereof as belonging to his father's succession; but denied that he had taken such possession as would make him liable personally for any debt or mortgage claim against the property, or for any of the rents and revenues thereof. He again set up the order of seizure and sale as a merger of the debt; and averred that the said executory proceedings were still pending in the District Court. He also set up and annexed to his answer the proceedings and judgment in the suit No. 772, by virtue of which he insisted that the matters in controversy in this suit had become *res adjudicata;* and the cause came on for trial upon the issues thus presented by the pleadings.

The proceedings on the order of seizure and sale, and in the suit No. 772 in the District Court and in the Supreme Court of Louisiana, as also the mortgage and sheriff's deed, were either admitted or proved. Certain evidence taken in the latter case, and certified with the other proceedings, was also admitted by stipulation of the parties. This was all the evidence adduced at the trial in the Circuit Court.

The evidence admitted by stipulation was to the effect, amongst other things, that James H. Gilfoil resided with his father on the property in question at the time of the latter's death, and still resided there in November, 1874, and had possession of the said property; that Patrick Gilfoil died Oct. 2, 1872; that Catharine his wife died April 13, 1866; that the defendant was her son and only heir; that he was fifteen years of age in 1867; but that he was emancipated before his intervention was filed in the suit No. 772 (being a minor).

The Circuit Court gave judgment for the defendant, but on

what ground does not appear. The ground taken in this court by the appellee in support of the judgment is, first, the point of *res judicata;* and, secondly, the prescription of five years. The appellant attempts to controvert these grounds of defence by showing, as to the first, that the question presented in the present suit is not the same question which was decided between the parties in the suit No. 772, and that the order of seizure and sale is no merger of the original debt; as to the second, that the alleged prescription was interrupted and suspended by the order of seizure and sale, and the subsequent proceedings in reference thereto.

The first matter to be considered, therefore, is whether the question endeavored to be raised in this suit was or was not passed upon or necessarily involved in suit No. 772.

The object of the present suit is to charge the defendant, as universal heir of his father, Patrick Gilfoil, with the entire debt, on the ground that the defendant as such heir possessed himself of his father's interest in the plantation. Was this question passed upon or necessarily involved in suit No. 772? From the recital of the pleadings in that case it is apparent that the primary and main object was to maintain the plaintiff's title to, and to recover, the land itself under the sheriff's sale, made by virtue of executory process in 1869. The defence of Patrick Gilfoil, prior to his death, was that the sale was absolutely void by reason of non-compliance with the forms of law required in such cases. The defence of James H. Gilfoil, as intervener, was, as to one undivided half of the land, that it belonged to his mother by right of community, and was inherited by him from her; and as to the other undivided half, that the sheriff's sale was void for want of possession, and that the debt for which it was sold was prescribed. The decision of the Supreme Court was with the defendant on both points; namely, first, that the defendant was owner of one undivided half of the land by virtue of his inheritance from his mother, who was decreed to have been the undivided half owner or partner in community with her husband; secondly, that the sheriff's sale was void for want of actual service and possession. From all that appears by the record, there was no adjudication on the question of defendant's liability as arising from his tak-

ing and keeping possession of one undivided half of the property as heir of his father, unless such adjudication is to be implied from the pleadings. A more particular examination of these is necessary to determine this matter.

The original petition simply claimed ownership of the property, alleged that Patrick Gilfoil was in unlawful possession of it as a trespasser, and prayed that the petitioner's title might be recognized, that she might have judgment for the property, and a judgment against Patrick Gilfoil for the rents and revenues. It was almost the exact equivalent of the common-law action of ejectment, or rather of a real action involving the question of title only.

After the intervention of James H. Gilfoil, and the death of Patrick, the plaintiff answered the intervener's claim by denying that he was the legal heir either of Patrick or his wife, and denying any right of community in the latter, alleging that the property was the separate property of Patrick; but if there was any community, alleging that the debt for which the property was sold was a community debt, and as such the property was liable for it, and was properly and legally sold to pay the same.

By her supplementary petition against James, the plaintiff alleged that he was then in possession of the property, and claimed to be the legitimate heir of Patrick, and refused to deliver the possession; and that if Patrick left any succession at his death, it was taken possession of by James without any process of law, and used for his own purposes, whereby he became an intermeddler, thereby rendering himself liable for all the debts of the succession, and especially personally bound for the rents and revenues of the property in question from the date of the unlawful possession thereof by Patrick. But the prayer was only that the petitioner might recover of James judgment as prayed for in the original petition, and the rents and revenues since the death of Patrick. The petition contained no prayer for a personal judgment against him; and the debt itself was not set up as a ground of claim or action, in either the original or supplemental petition.

It seems plain, therefore, that the character of the suit was consistently maintained throughout as a petitory suit for the

property, and for an account of its rents and revenues. No judgment was sought by the plaintiff against the defendant for the debt. His supposed liability for the debts of the succession on account of possessing himself thereof without any process of law was only stated incidentally, by way of rebutting his pretension of being other than a mere trespasser on the property. His liability for the debt was not put in issue by the pleadings, and was not considered by the court. The question of the title alone was the burden of the action, and was all that was decided in the judgment.

We are of opinion, therefore, that the plea of *res judicata* is not maintained.

We are also of opinion that the order of seizure and sale effected no merger of the debt. That order was made upon the act of mortgage as an authentic instrument importing confession of judgment. Code of Practice, arts. 732, &c. The order was a mere award of executory process, and did not affect in the slightest degree the nature or dignity of the primary securities for the debt. If seizure and sale of mortgaged property do not result in full satisfaction of the debt, suit has to be brought on the primary security in order to recover the balance. *Harrod* v. *Voorhies's Adm'x*, 16 La. 254; *Humphreys* v. *Brown*, 19 La. Ann. 158.

The next question is, whether the plea of prescription has been sustained in this case. Five years is the regular time of prescription against bills of exchange and promissory notes payable to order or bearer. Civ. Code, art. 3540. And this prescription runs against minors and interdicted persons. Art. 3541. The last of the notes upon which the defendant is sought to be made liable matured on the 1st of January, 1869. The claim, therefore, became prescribed on the 1st of January, 1874, unless the prescription was interrupted by some lawful cause. A legal interruption takes place by a judicial demand made upon the debtor. The plaintiff alleges that prescription in this case was interrupted by service of notice of the order of seizure and sale upon Patrick Gilfoil, on the twenty-fifth day of March, 1869, and that such interruption continued at least until the death of Patrick Gilfoil, Oct. 2, 1872, because the plaintiff could at any time, after the writ had expired, or after

the sale under it had been set aside, issue an *alias* writ without a new order. The plaintiff contends, in other words, that an order for seizure and sale, served on the debtor, is a judicial demand, the same as an ordinary suit; and that it continues in operation as such until it has been rendered effective by a valid sale. This position seems to be sustained by several decisions of the Supreme Court of Louisiana. *Stanbrough* v. *McCall*, 4 La. Ann. 322; *Fortier* v. *Zimpel*, 6 id. 53; *Rhea* v. *Taylor*, 8 id. 23; *Walker* v. *Lee*, 20 id. 192; *Roupe* v. *Carradin*, id. 244; *Hebert* v. *Chastant*, 22 id. 152; 23 id. 687. In *Roupe* v. *Carradin* (20 id. 244), the note matured in January, 1858, and an order of seizure and sale was made and served in June, 1858, a writ was issued and a levy was made, but no sale took place. In 1867 (nine years afterwards), a new writ was issued on which an injunction was obtained on two grounds: first, a claim of homestead; secondly, prescription. Both of these grounds were overruled. As to the latter, the court say: "The plea of prescription cannot avail; it was interrupted by the order of seizure and sale, duly notified to the plaintiff, as we have recently decided in *Walker* v. *Lee*."

Numerous authorities also show that the setting aside of a sale for irregularity does not affect the order of seizure and sale, but a new writ may issue upon it. In *Citizens' Bank* v. *Dixey* (21 id. 82), the court say: "This is an appeal from an order of seizure and sale. It is well settled that on such an appeal the only question is, whether there was before the judge *a quo* sufficient evidence to authorize the fiat. The order cannot be set aside on appeal, on account of subsequent irregularities in the execution of it, as by not notifying the proper parties or otherwise. *Dodd* v. *Crain and Another*, 6 Rob. (La.) 60." In *Fortier* v. *Zimpel* (6 La. Ann. 54), there were three successive writs issued upon the same order. The first was stayed by the plaintiff, and an *alias* issued. This was annulled, on the ground of being issued for too large a sum. Plaintiff, considering the original petition still in court, then applied for a *pluries* writ, which was granted. A sale made under this writ, though strenuously contested, was homologated and confirmed. In *Riddel* v. *Ebinger* (6 id. 407), the sale was sought to be annulled. The court, amongst other things, say: "The writ

under which the sale was made was an *alias*, and it is contended that the order of seizure was a judgment only so far as the original writ was concerned; that it expired when the writ was returned, and that no other writ could issue without a new order of court. This objection has so often been held unfounded by our predecessors and ourselves, that we deem it unnecessary to do more than to refer to some of the cases in point." The court then referred to *Ursuline Nuns* v. *Depassau*, 2 Mart. N. S. (La.) 646; *Mader* v. *Fox*, 15 La. 159; *Harrod* v. *Voorhies*, 16 id. 254; *Fortier* v. *Zimpel*, 6 La. Ann. 53. In *Stanborough* v. *McCall* (4 id. 327), the court explain the reason why proceedings on an order of seizure and sale interrupt the prescription of the personal action for the same debt. They say: "The rule harmonizes with the theory of prescription, which has its basis in the presumption of renunciation on the part of him who neglects his rights, and which presumption cannot be entertained against a party who is struggling to collect a debt, and is not *sui juris contemptor*. The interruption, then, created by the institution of one species of action must also be considered as continuous, and as preserving the personal action while the hypothecary action is in course of prosecution.

These cases, with others that might be cited, seem fully to establish the position of the plaintiff, and we think that the position is clearly applicable to the present case. In 1869, soon after the debt became due, the plaintiff filed her petition for an order of seizure and sale. The order was granted and served on the debtor, then in possession of the mortgaged premises, and the property was sold. From that time to the debtor's death in October, 1872, and afterwards, until judgment was given against her in March, 1875, she was engaged in a continuous struggle in the courts to obtain the fruits of that order and sale. The sale was held to be void by the irregular proceedings of the sheriff; and according to the decisions of the State courts, her petition and the order made thereon were still in force, and, if she pleased, she could have applied for the issue of another writ thereon. It may be that it would have been necessary to have the petition and order amended; but that would not disaffirm the pendency of the proceedings or the jurisdiction of the court.

We think, therefore, that the proceeding for seizure and sale interrupted the prescription of the personal action on the notes; and that this interruption continued up to the time when the final judgment of the Supreme Court of Louisiana was rendered against the plaintiff. The present action was commenced about a year and a half afterwards; and therefore, in our judgment, the plea of prescription must fail.

It may be proper here also to observe, although the point was not pressed in the argument, that the exception to the jurisdiction of the Circuit Court is destitute of foundation. The suggestion was, that, as the proceedings in the order of seizure and sale were still pending in the District Court, the debt could not be prosecuted in the Circuit Court of the United States. But it has been frequently held that the pendency of a suit in a State court is no ground even for a plea in abatement to a suit upon the same matter in a Federal court. What effect the bringing of this suit, *via ordinaria*, may have had on the order of seizure and sale, it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, cannot affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof.

The only remaining question is, whether the defendant has rendered himself liable for the notes by taking possession of the plantation and receiving to his own use the rents and revenues thereof. At the time of his father's death the defendant was only nineteen, or, at most, twenty years of age. Art. 977 of the Civil Code declares that "it shall not be necessary for minor heirs to make any formal acceptance of a succession that may fall to them; but such acceptance shall be considered as made for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of a formal acceptance." Heirs having the benefit of inventory are called beneficial heirs, and are not personally liable for the debts of the succession. This shows that the defendant, though he took possession of his father's property, did not thereby make himself personally liable for the notes in suit, unless the fact that he was emancipated before his father's death, and while yet a minor, renders him so liable. Art. 370 of the Code

declares that "the minor who is emancipated has the full administration of his estate, and may pass all acts which are confined to such administration, grant leases, receive his revenues and moneys which may be due him, and give receipts for the same." But art. 371 adds, that "he cannot bind himself legally by promise or obligation for any sum exceeding the amount of one year of his revenue." The position of the plaintiff is, that the defendant, by taking possession of his father's undivided half of the mortgaged property, made himself liable for the whole debt in suit. It seems to us that this would be in contravention of the spirit, if not the letter, of arts. 871 and 977 of the Code.

Besides, the defendant was owner of one undivided half of the property as heir of his mother; and he could not possess himself of his own property without, at the same time, possessing himself of the other half. Under these circumstances, considering his status as a minor at the time of his father's death, the sort of possession which he assumed ought not to be turned to his disadvantage as any evidence of an intention to accept his father's succession as universal heir.

The conclusion to which we have come is, that the plaintiff cannot have any personal decree against the defendant for the amount of the debt; but that she is entitled to a decree for the foreclosure and sale of one undivided half part of the plantation covered by the mortgage. The decree of the Circuit Court is reversed, and the cause remanded to that court, with directions to render a decree in accordance with this opinion.

Each party will be decreed to pay his and her own costs, both in this court and in the Circuit Court; and it is

So ordered.

BURT v. PANJAUD.

1. An error committed in overruling an objection to a juror as legally disqualified is cured, where it appears affirmatively that he was not a member of the panel which tried the case, and it does not appear that by his exclusion therefrom the party's right of challenge was abridged.
2. A person offered as a juror is not compelled to disclose under oath his guilt of a crime which would work his disqualification. If he declines to answer, the objecting party must prove such disqualification by other evidence.
3. In ejectment, or trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor, prior to his eviction, is *prima facie* evidence of title, on which he can recover against a mere trespasser.

ERROR to the Circuit Court of the United States for the Northern District of Florida.

The facts are stated in the opinion of the court.

Mr. H. Bisbee, Jr., for the plaintiff in error.

Mr. James M. Baker, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an action of ejectment brought in the Circuit Court of St. John's County, Florida, by Maria M. Panjaud, to recover the possession of two lots or parcels of land in the city of St. Augustine. The suit was subsequently removed to the Circuit Court of the United States. The defendant set up no title whatever to the lots, nor, as far as the record shows, did he even rely upon the Statute of Limitations, although he had been in possession of the demanded premises for several years before the commencement of the suit. Judgment was rendered against him, and he sued out this writ of error.

A bill of exceptions presents the errors we are called upon to examine.

It appears that, before the jury was sworn to try the case, one of the panel, Henry Holmes, was sworn on his *voire dire*, and was asked whether or not he had aided or abetted the late rebellion against the United States, when he was told by the presiding judge that it was optional with him whether he would answer the question or not; and said Holmes declined to answer. The defendant excepted to this ruling, and then

moved that Holmes be excluded for cause, which the court overruled, and defendant excepted again.

It appears affirmatively that Holmes was not sworn as one of the jury, and no reason is given for it.

1. We are of opinion that, since Holmes did not sit on the jury, no harm was done to defendant. The object of both motions was to exclude him as one incompetent to sit. It is immaterial to the defendant how this was brought about. It is possible that if defendant had shown affirmatively that he was excluded by reason of his peremptory challenge, and that in doing so the exercise of his right of peremptory challenge had been abridged, the result might be otherwise. It is sufficient to say that the record does not show that he was on the jury, but in fact that he was not, or that in getting rid of him any right of defendant was abridged or lost.

2. But we are further of opinion that a juror is no more than a witness obliged to disclose on oath his guilt of any crime, or of any act which would disgrace him, in order to test his qualification as a juror. The question asked him, if answered in the affirmative, would have admitted his guilt of the crime of treason. Whether pardoned by a general amnesty or not pardoned, we think the crime was one which he could not be required to disclose in this manner. Nor would this ruling deprive the party of his right of challenge. Like a conviction for felony, or any other disqualifying circumstance, the challenger was at liberty to prove it by any other competent testimony.

He did not offer to do this, and as the juror's incompetency was not proved, the court was not bound to exclude him.

All the other exceptions relate to the insufficiency of plaintiff's title to recover, it being conceded that defendant showed none in himself.

It is true that plaintiff does not trace her title to any acknowledged source. But as to lot 4, she produces a deed from M. C. Mordecai and Thomas Kerr, dated April 30, 1845, conveying the lot to her; and she proves by a competent witness that there were two houses on this lot, and that she lived in one or both of them from 1845 to 1847, and that one Selenoa, as agent for plaintiff, returned this property for taxes

and paid the taxes from 1857 to 1860, and that the two houses were occupied.

As regards the other lot of ground, no written evidence of title is proved, but the tax-collector states that the same Mr. Solonoa, professing to act for plaintiff, paid the taxes on this lot as on the other, and that witness leased this lot from him, professing to act as agent of plaintiff.

On this evidence the court instructed the jury in several forms, that if they believed the plaintiff had possession of the lots in suit at the times mentioned, that the presumption was that she retained possession by herself or tenants until ousted by defendant, and that her removal from the city of St. Augustine was not necessarily an abandonment of this possession; and if her possession had continued for seven years, it was sufficient to enable her to recover against a trespasser or one showing no right to enter.

We think there was sufficient evidence as to both lots of plaintiff's possession under claim of ownership. The deed from Mordecai and Kerr, with her actual residence on lot 4, and payment of taxes, was clearly sufficient to establish such possession. So, also, as regards the other lots, the witness who paid the rent was her tenant. The payment of the rent to a man who professed to act as her agent bound the tenant to her as such, and he could not have disputed her title. It was her possession. This was corroborated by the payment of taxes and the absence of any proof of abandonment or loss of possession prior to defendant's tortious entry. It was sufficient for the jury, in the absence of any pretence of right by defendant.

This principle is so well settled in the law of ejectment and trespass *quare clausum fregit*, as to need no citation of authority. It will be found laid down by Mr. Greenleaf in 2 Greenl. Evid., sect. 311, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee; also sects. 618, 618 *a*. See also *Hutchison* v. *Perley*, 4 Cal. 33; *Nagle* v. *Massey*, 9 id. 426.

There are no other assignments of error worthy of notice, and we see no error in the record.

Judgment affirmed.

MR. JUSTICE FIELD concurring.

I agree with the court that the juror Holmes, in this case, could not be required to answer the questions put to him; but I go further. I do not think that the act of Congress, which requires a test oath as to past conduct, and thereby excludes a great majority of the citizens of one-half the country from the jury-box, is valid.[1] In my judgment, the act is not only oppressive and odious, and repugnant to the spirit of our institutions, but is unconstitutional and void. As a war measure, to be enforced in the insurgent States when dominated by the national forces, it could be sustained; but after the war was over, and those States were restored to their normal and constitutional relations to the Union, it was as much out of place and as inoperative as would be a law quartering a soldier in every Southern man's house.

MR. JUSTICE STRONG dissented, on the ground that the evidence of plaintiff's possession was not sufficient to raise the presumption of title.

ATWOOD v. WEEMS.

1. The right, under sect. 821 of the Revised Statutes, to require the panel of the jurors called to serve for a term to take the oath therein prescribed, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors in a case about to be tried.
2. A testator in whom was the legal title to lands, which he had sold by a written contract, can transfer by his will both such title and the notes given for the purchase of them, and the devisee will stand towards the purchaser in the same position that the testator did.
3. The court reaffirms the ruling in *Bennett* v. *Hunter* (9 Wall. 326) and *Tacey* v. *Irwin* (18 id. 549), that a sale for direct taxes under the act of 1862 is void, where, before the sale, the owner, or some one for him, was ready and offered to pay them, and was told that payment would not be accepted.
4. Such offer to pay, made to a clerk of the board of commissioners at their office, who was authorized by them to receive delinquent taxes generally, is sufficient.

ERROR to the Circuit Court of the United States for the Northern District of Florida.

The facts are stated in the opinion of the court.

[1] The act was passed in 1862, repealed in 1871, and re-enacted in 1874 by sect 820, Rev. Stat.

Mr. H. Bisbee, Jr., for the plaintiff in error.
Mr. James M. Baker, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an action of ejectment for a lot in St. Augustine, brought in the proper court of the State of Florida, and transferred into the Circuit Court of the United States for that district, where the plaintiff below recovered a judgment against the plaintiff in error, which we are called on to review. The questions to be decided are all raised by a bill of exceptions.

1. It appears "that the defendants moved the court that the jurors of the panel be required to answer upon oath whether or not they had given aid and comfort to, or aided and abetted, the late rebellion against the government of the United States, within the true sense and meaning of sect. 820 of the Revised Statutes, for the purpose of exercising the right of challenging them, if they came within its provisions." The court denied the motion, on the ground that said section was unconstitutional.

We decided in *Burt* v. *Panjaud* (*supra*, p. 180), from the same circuit, that a man cannot be compelled to answer this question when put to him separately in reference to the right of challenge for the disqualification prescribed by that section, and that to enable a party to avail himself of the right there given, he must prove by other evidence, if the proposed juror declines to give it, that he has been guilty of the offences which so disqualify him.

But sect. 821 authorizes such an oath to be tendered to the whole panel, at the instance of the district attorney or his representative. This, however, must be at the beginning of the term, and relates to service on the panel for the term. The right to tender the oath is discretionary with the attorney for the government, and belongs to no one else.

It is not a right, therefore, in a party to a civil suit to tender such oath in that suit. Sect. 821 does not require the panel, or any one on it, to take the oath or to take a general oath to answer questions touching his qualifications, but provides expressly for his declining to take the prescribed oath. This act of declining of itself disqualifies him as a member of the panel for that term. This right to decline to swear confirms what

we have said in *Burt* v. *Panjaud;* namely, that it was not intended to compel the proposed juror to disclose on oath his own guilt. Since, therefore, the defendant had no right to challenge the entire panel, as the district attorney might have done at the beginning of the term, nor to require each member of it to testify as to his guilt or innocence of treason, and since he offered no evidence that any one of them was so disqualified, the court was right in overruling his motion.

The judge's declaration of opinion that the law was unconstitutional did not make his action erroneous when it was right on other grounds.

2. The next question arises out of the construction of the will of Francis M. Weems, under which plaintiffs claimed title.

The will is in the record, and is dated Sept. 25, 1865, and conveys a lot in St. Augustine, three notes due from J. H. Meyers for $500, each given for the purchase of a lot in St. Augustine, and all his other property, to his wife and three sons, who are the plaintiffs. A written agreement, made in 1860 by Francis M. Weems, for the sale of this lot to J. H. Meyers, is offered in evidence, with proof that Meyers had taken possession under it. The court was asked to instruct the jury that the will did not convey the title to the lot, but only the notes of Meyers; and that, if it was designed to convey the title, it was void, by reason of the adverse possession of defendant. The court refused to do this, and said that the failure to pay the notes gave to the testator, Weems, a right of entry which passed by the will.

It is clear that the contract with Meyers left the legal title in Weems. This legal title passed by the will as well as the notes; and though it may have been the desire of the testator to recognize the contract for the sale, it was necessary, to enable the devisees and the executor to enforce the collection of the notes, that the title should be in them also. They could then either tender a deed and demand payment, or assert their right of entry for failure of the purchaser to pay.

It is not necessary to decide here whether by the common law a testator having the legal title and right of entry of land in the adverse possession of another could make a valid devise

of the title, or whether, if that be the common law, it was the law of Florida; for it appears both by the will itself and by other evidence in the record that the plaintiffs are heirs as well as devisees of Francis M. Weems, and if the will did not convey the title, it was theirs by inheritance.

3. Defendants produced in evidence a certificate of sale of this lot for taxes made by commissioners appointed under the act of June 5, 1862, for the collection of direct taxes in insurrectionary districts within the United States, to Adolph Mayer, and an assignment from Mayer to Anna M. Atwood, one of the defendants, and possession under that certificate. In avoidance of this certificate, plaintiffs introduced evidence tending to prove that the sale was not advertised as long as the law required, and also that before the sale their testator offered to pay the taxes and costs, which the commissioners refused to receive.

The evidence on this last point, which is without contradiction, is that the commissioners had determined that no taxes could be lawfully paid, after the advertisement of the sale, by any one else but the owner of the property; and that under this view of the matter the clerk of the board of commissioners, who had charge of the office at St. Augustine, twice peremptorily refused to receive the tax due from Weems on this lot.

One offer to pay was made by Amos Corbitt, who was in possession of the lot under J. H. Meyers, the purchaser from Weems, and the other by Christoval Bravo, an agent authorized by Weems to do so. To Corbitt the clerk said he would take the money from no one but the owner, and he might as well talk of paying tax for Jeff. Davis.

In *Bennett* v. *Hunter* (9 Wall. 326) and *Tacey* v. *Irwin* (18 id. 549) we decided this very question. In the former case, the tax was offered by a tenant of the owner and refused, and we held the sale void; and further, that said payment could be made by any friend or agent of the owner, whose act he recognized. The case of *Tacey* v. *Irwin* went further, and held that neither payment nor actual tender was indispensable, but that a refusal to receive the taxes rendered a manual tender unnecessary. If the party offered to pay, was ready to

pay, and was told it would not be accepted, it defeated the sale as much as payment.

Some attempt is made to show that Dunham, the clerk, to whom Corbitt and Bravo applied, was not authorized to receive taxes, and that they could only have been lawfully paid or tendered to the commissioners in person at Fernandina.

But it appears by the testimony of the commissioners themselves that they had an office at St. Augustine as well as at Fernandina. That Dunham, their clerk at the former place, was authorized to receive, and did receive, the taxes which were payable there, and that all the money received for taxes at that place was paid to him. Of their right to authorize him to act for them in the receipt of taxes we have no doubt, and that his refusal to receive these taxes, which was under instructions from them, was the same as if they had done it in person.

The sale, therefore, was void. Payment of the taxes is one of the matters which, by the express terms of sect. 7 of the amendatory act of 1862, may be shown to avoid the certificate; and in the cases cited we have held that an offer to pay, and refusal to receive, had the same effect. The error of the judge concerning the length of the advertisement of the sale, which is not one of the matters that will avoid the certificate under that section, was immaterial, as it was clearly void, for the reason we have just stated.

We see no error in the judgment, and it is, therefore,

Affirmed.

MR. JUSTICE FIELD concurring.

I agree with my associates that the jurors summoned in this case could not be required to make oath whether they had participated in, or given aid and comfort to, the late rebellion against the government of the United States. And I also agree with the court below as to the unconstitutionality of the act which excludes from the jury persons who decline to take such oath.

Undoubtedly Congress may prescribe the qualifications of jurors in the Federal courts, and declare the causes of disqualification and challenge. But if any of these causes be the commission of an act which the law has made a public offence,

it is not competent for the court to go into an investigation to determine the guilt or innocence of the juror. That is to be ascertained only in one way, — by a separate trial of the party upon an indictment for the offence; and the only competent evidence in such case is the record of his conviction or acquittal. It would be a strange and unprecedented thing for a court, upon the challenge of a juror, to go into a side trial, whether he had committed a felony, such as highway robbery, arson, or murder. No one would contend that such a procedure is admissible; and if not in those cases, it is not admissible in any case where the commission of a public offence is the ground of challenge.

The court may take judicial notice, from the existence of war, that a whole people are public enemies; but it cannot take judicial notice that a whole people, or individuals of it, have violated the municipal laws of the country. If such violation be relied upon to exclude a person from becoming a witness or a juror, it must be shown, not by evidence of what others may have seen or heard, but by the record of the party's conviction.

KETCHUM v. BUCKLEY.

Where the President, at the close of hostilities, appointed a military governor of one of the States, the people whereof had been in rebellion against the United States, — *Held*, that such appointment did not change the general laws of the State then in force for the settlement of the estates of deceased persons, nor remove from office those who were at the time charged by law with public duties in that behalf.

ERROR to the Supreme Court of the State of Alabama.

In accordance with a special statute of Alabama, authorizing the appointment of a general administrator and general guardian for Mobile County, and for other purposes, approved Dec. 14, 1859, Wesley W. McGuire having been duly appointed to that office for the term of four years, he, March 7, 1864, made and delivered to the probate judge of the county his bond, in the penal sum of $150,000, conditioned according to law, with

Ketchum and others as his sureties thereon. Letters of administration were granted to him Sept. 21, 1865, upon the estate of William Buckley, deceased, by the Probate Court of said county, by virtue whereof he administered upon the estate. In May, 1869, in answer to a citation served upon him at the instance of the heirs of Buckley, he made a final settlement of his administration of the estate, and decrees were entered against him for the sums due to each of them respectively. Executions were issued on the decrees, and returned "no property found." George W. Buckley, one of said heirs, thereupon brought suit in the Circuit Court of Mobile County for the sum due to him by said decree, alleging that for the *devastavit* of the assets of the deceased, committed by the said McGuire, he and the other defendants, his sureties, were liable on the bond.

McGuire died after the commencement of this suit. His sureties set up that at the time of his appointment Alabama, as one of the so-called Confederate States, was at open war with the United States, but that before June 20, 1865, the Confederate government was subdued, the insurrectionary government of the State overthrown, and her entire people under martial law; that the President, in his proclamation of June 21, 1865 (13 Stat. 767), declared that the rebellion had "deprived the people of the State of Alabama of all civil government;" that he appointed Lewis E. Parsons governor, and authorized him to organize civil government in the State; that Parsons, in pursuance of the proclamation, and by virtue of the authority thereby conferred, called a convention of the people to be elected as therein prescribed to meet at Montgomery, to inaugurate civil government in the State; that he retained in office by name all justices of the peace and certain other officers, but declared that sheriffs and judges of the Probate Court were only retained until others should be appointed upon application of the people of the respective counties, but he authorized them to continue to discharge the duties of their respective offices upon taking the oath of fidelity to the United States; that George W. Bond had been elected probate judge of that county in May, 1861, for the term of six years, and was in office when the insurrectionary State government was overthrown; that said Parsons appointed said Bond to the office of probate

judge; that the office of said McGuire as general administrator and general guardian had, by reason of the premises, ceased before the letters of administration were granted to him on the estate of said Buckley; that he was not named in the proclamation as one of the officers retained; that the grant of the letters to him was therefore void; and that his sureties were not liable for his administration of said estate.

The Circuit Court held, on demurrer, the defence to be insufficient to bar the suit. Judgment was rendered for the plaintiff, and it having been affirmed by the Supreme Court, the defendants sued out this writ of error.

Mr. Thomas J. Price, for the defendant in error, moved to dismiss the writ for want of jurisdiction, and to affirm the judgment below.

Mr. Philip Phillips and *Mr. E. S. Dargan*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We are not willing to hear an argument on the only possible Federal question presented by this case. It is now settled law in this court that during the late civil war "the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." *Williams* v. *Bruffy*, 96 U. S. 176; *Horn* v. *Lockhart et al.*, 17 Wall. 570; *Sprott* v. *United States*, 20 id. 459; *Texas* v. *White*, 7 id. 700. The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf. It is not alleged that the governor after his appointment undertook by any positive act to remove McGuire from the position he occupied as general administrator, or that McGuire himself at any time ceased to perform

the duties of his office by reason of what was done by the President or others towards the restoration of the State to its political rights under the Constitution of the United States. From all that appears in the record, he continued to act during the whole of his term as general administrator of the county, notwithstanding the changes that were going on in the other departments of the State government. Under these circumstances, it is so clear that the judgment of the court below was right, that we grant the motion to affirm.

Judgment affirmed

EXPRESS COMPANY v. RAILROAD COMPANY.

A contract between A., a railroad company, and B., an express company, stipulated that B. should lend A. $20,000, to be expended in repairing and equipping its road, and that A. should grant to B. the necessary privileges and facilities for the transaction of all the express business over the road, the sum found to be due A. therefor, upon monthly settlement of accounts, to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B. had advanced the money, and entered upon the performance of the contract, A. conveyed all its property, including its franchises, to C. in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C. brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B., the latter, with the consent of the court, brought its bill in equity for specific performance against him, A., and C. *Held*, 1. That the receiver is the only necessary party defendant. 2. That the transaction between the companies is not a license, but simply a contract for transportation creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver cannot be required to make.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina.

This is a bill in equity, filed June 18, 1875, by the Southern Express Company, a corporation of Georgia, against the Western North Carolina Railroad Company, a corporation of North Carolina, W. A. Smith, and Henry Clews, for the specific performance of a contract entered into Dec. 2, 1865, between the railroad company and the complainant.

The bill alleges that the railroad company was organized for the purpose of constructing a railroad from Salisbury, North Carolina, to a point on the Tennessee line; that it completed that portion of its line between Salisbury and Morganton, and put it in running order; that the road-bed, rolling-stock, &c., became dilapidated during the war, and that the company in 1865 was without the means to repair the road and make it safe for the transportation of passengers and freight; that the company, having been unsuccessful elsewhere, applied to the complainant for a loan or advance of $20,000; that the complainant having agreed to loan or advance that sum in consideration of securing the exclusive privilege of transporting freights over said road as far as Morganton, and of certain other advantages, entered, with the advice and consent of the stockholders of the railroad company, into the following contract with that company: —

"This indenture of agreement, made and entered into this second day of December, A. D. eighteen hundred and sixty-five, between the Western North Carolina Railroad Company, as party of the first part, and the Southern Express Company, as party of the second part, witnesseth as follows: —

"Whereas the party of the second part has agreed to loan and advance to the party of the first part the sum of twenty thousand ($20,000) dollars upon the notes of said railroad company, bearing interest at the rate of six per cent per annum, which sum is to be expended in repairs and equipments for said road. And whereas the party of the first part is desirous of securing the services of an efficient and responsible agent for the transaction of all of the express business over its road, and is willing to provide the requisite facilities for the proper transaction of said express business in the manner and upon the terms hereinafter specified:

"Now, therefore, in consideration of said loan and advance, and the rents, covenants, and agreements hereinafter made and provided, said party of the first part hereby agrees and binds itself to grant to the said party of the second part the necessary privileges and requisite facilities for the transaction of all the express business over the entire length of their road, extending from Salisbury to Morganton, in North Carolina, and furnish such facilities by all its passenger trains running each way over its road as may be necessary to forward without delay all the express matter that may be

offered by said party of the second part, and to do all in its power to promote the convenience of said party of the second part in the transaction of its express business, both at way and terminal stations.

"Said party of the second part agrees to load and unload said express matter by its own agents, at its own proper costs and charges, and save harmless said party of the first part against all claims for loss and damage to the express matter of the party of the second part, except that which occurs from the negligence and carelessness of said party of the first part or its agents.

"The said party of the first part agrees to carry free of charge the messengers in charge of express matter and the officers and agents of the said party of the second part passing over the road upon express business. The said party of the second part agrees to pay to the said party of the first part fifty cents per hundred pounds for all express matter carried over the road. An account of the weights of all express matter shall be taken by said party of the first part whenever they shall see fit to do so, and delivered to the agent of the party of the first part, weekly or monthly, as may be desired.

"The accounts for transportation to be made up monthly, and the sum found to be due to said railroad company for transportation, at the rate hereinafter specified, shall be applied monthly toward the payment of said twenty thousand ($20,000) dollars, until the whole sum, with interest, is paid, after which payments for transportation shall be made by said party of the second part monthly in cash.

"This contract shall remain in force for the full term of one year, from the first day of January, eighteen hundred and sixty-six. If the said sum of twenty thousand ($20,000) dollars, with interest thereon, shall not have been repaid to the said second party at the expiration of said one year, this contract shall continue in force for a further period, and until the whole of said twenty thousand ($20,000) dollars, with interest thereon, shall have been repaid. And the said party of the first part hereby covenants and agrees that it will not furnish express privileges over said road to any other parties during the existence of this contract on any more favorable terms than those herein made with the said party of the second part, both as to rate of transportation paid, advance payments, and total amount paid per annum. It is mutually covenanted and agreed by the parties hereto that any other contracts that may now exist, whether verbal or written, for express service

between the parties hereto, shall terminate and cease on the thirty-first day of December, eighteen hundred and sixty-five, at which time this contract shall take effect.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"TOD R. CALDWELL,
"Pres't W. N. C. R. R. Co.
"H. B. PLANT,
"Pres't Southern Express Company."

The bill then alleges that the $20,000 was paid in compliance with the contract, and that shortly thereafter the complainant entered upon the road, transported freight according to the terms of the contract, kept regular accounts and exhibited them to the company, which were always approved, and it continued to act under said contract until July, 1873; that in 1870 the railroad company conveyed to Tod R. Caldwell and Henry Clews, as joint tenants, and to the survivor of each, — the former of whom has since deceased, — all its real and personal property, including its franchises, in trust, to secure a large number of its bonds then about to be issued; that $1,400,000 of said bonds were sold or hypothecated, and came into the hands of persons unknown to the complainant, but for much less than their value and not by a *bona fide* sale; that, notwithstanding, the alleged creditors of the company instituted foreclosure proceedings in the Circuit Court of the United States for the Western District of North Carolina, and in 1873 obtained a decree ordering the sale of all the property of said company; that the defendant, Smith, having in that suit been appointed receiver of the company, forbade the complainant, in July, 1873, from further using the cars of the company, unless upon conditions whereby said contract was virtually surrendered or ignored; that thereupon the complainant was compelled to abandon said railroad, although the money so loaned, with a portion of the interest thereon, is still due and unpaid. It then alleges that the suit is brought with the consent of said court, and with the privilege of making such parties defendant as might be deemed necessary for that purpose; that the trustees in the mortgage to secure the bonds of the railroad company had express notice

of the contract when they accepted the trust, and that it was claimed by the complainant as an existing lien; that the substance of said contract had been published separately at the instance of the stockholders of the railroad company, and was well known to its creditors and to the purchasers of its bonds at the time, and especially to the defendant Smith; and that the railroad company having conveyed away its property, and being in part insolvent, the violation of the contract cannot be compensated by any damages which would be recovered at law. The bill therefore prays for a decree compelling the railroad company to specifically perform its contract, and for such other and further relief as the nature and circumstances of the case may require, and for process against the defendants.

The charter of the railroad company granted in February, 1855, is annexed to the bill and made a part thereof. Its twenty-fifth and twenty-sixth sections are as follows: —

"SECT. 25. Be it further enacted, that the said company shall have the exclusive right of conveyance, transportation of persons, goods, merchandise, and produce over the said railroad, to be by them constructed, at such charges as may be fixed on by the board of directors.

"SECT. 26. Be it further enacted, that said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and the said company and every one who may have received from it the right of transportation of goods, wares, and merchandise over the said railroad, shall be deemed and taken to be a common carrier, as respects all goods, wares, produce, and merchandise intrusted to them for transportation."

At rule-day in July, 1875, the writ of subpœna was returned executed, and the cause continued until the October Term, when it was ordered that the commissioners in possession of the road in the western district of North Carolina, and Howerton, president of the company, be notified to appear and answer or demur to the bill of complaint at rule-day in January, 1876. The commissioners appeared and demurred. The demurrer was sustained and the bill dismissed. The express company then brought the case here.

Mr. Clarence A. Seward for the appellant.

The bill avers that the trustees in the mortgage had notice of the existence of the contract between the companies, and this fact is admitted by the demurrer. Caldwell, who executed the contract, was also one of the trustees in the mortgage, and he, therefore, as trustee, knew that he had executed the contract as president. *Ex parte Rogers*, 8 De G., M. & G. 271; *Weetjen* v. *St. Paul, &c.*, 4 Hun (N. Y.), 529. Notice to him was, in judgment of law, notice to all the trustees. *Smith* v. *Smith*, 2 Cromp. & M. 230; *Willes* v. *Greenhill*, 4 De G., F. & J. 147; *Mandeville* v. *Reed*, 13 Abb. (N. Y.) Pr. 178.

As between the two companies the contract was valid. It was lawful for the express company to agree to look for its remuneration to the fund arising from the transportation of its freight over the road of the railroad company; and having made an agreement so to resort to such fund, equity would compel it to perform such agreement, and restrain it from prosecuting a suit at law.

The railroad company having authorized the express company to carry its freight, and specifically appropriated the moneys for such transportation when they came to the hands of the express company to the repayment of the loan, thereby constituted a fund in the hands of the express company, which the railroad company could not impair, divert, or waste. *Ketchum* v. *Union Pacific*, 4 Dill. 78; *Bird* v. *Hall*, 30 Mich. 87.

The contract created as between the companies an equitable lien upon the right of transportation, and upon an accruing fund, which equity will enforce as against all parties having notice thereof. *Groton* v. *Gardiner*, 11 R. I. 626; *Smithurst* v. *Edmunds*, 14 N. J. Eq. 408; *Butt* v. *Ellett*, 19 Wall. 544; *Pennock* v. *Coe*, 23 How. 117; *Dunham* v. *Railway Company*, 1 Wall. 254. If it may mortgage the property *per se*, no good reason is perceived why it may not, upon the use of the property, create an equitable lien which can be enforced against all subsequent purchasers who had notice of its existence.

The contract was a license for the enjoyment of the occupancy of way and terminal stations, and of the vehicles of the railway company while in transit. Such license was executed

by the express company so far as an advance payment of rent was concerned. The payment is called rent in the contract. Such license could not be revoked by the railroad company, or by those who purchased, or had notice prior to the attachment of their interest of the existence of such license. *Winter* v. *Brockwell*, 8 East, 308; *Taylor* v. *Waters*, 7 Taunt. 374 *Wood* v. *Lake*, Say. 108; *Ameriscoggin Company* v. *Bragg*, 11 N. H. 108.

The owner in fee of land may, by covenant, impose upon it any burden, not inconsistent with his general right of ownership, which is not in violation of public policy, and does not injuriously affect the rights or the property of others. *Van Rensselaer* v. *Albany*, 1 Hun (N. Y.), 507. Here the railroad company, by an instrument under seal, and without violating public policy, imposed upon its road the burden of occupancy of its stations and vehicles by the express company for a specific period, at a designated rent paid in advance.

As long as the owner of the fee retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally. A purchaser with notice is bound to perform them. *Parker* v. *Nightingale*, 6 Allen (Mass.), 344.

A court of equity can grant the relief prayed for not only by injunction, but by a decree for specific performance. *Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299; *Clark* v. *Flint*, 22 Pick. (Mass.) 231; *Barnes* v. *Barnes*, 65 N. C. 261; *Parker* v. *Winnipiseogee Company*, 2 Black, 545; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Trustees* v. *Lynch*, 70 N. Y. 440; *Lanting* v. *Cole*, 8 Green (N. J.), Ch. 229; *Shirman* v. *Morris Company*, 27 N. J. Eq. 264; *Errington* v. *Aynesley*, 2 Bro. C. C. 341; *Phillips* v. *Berger*, 2 Barb. (N. Y.) 608; *Withy* v. *Cottle*, 1 Sim. & St. 174; *Addetley* v. *Dixon*, id. 607; Story, Eq., sect. 723; *Storer* v. *The Great Western Company*, 2 You. & Coll. 48; *Wilson* v. *Furness Company*, Law Rep. 9 Eq. 28; *Ball* v. *Coggs*, 1 Bro. P. C. 296; *Price* v. *Mayor*, 4 Hare, 505; *Sanderson* v. *Cockermouth Company*, 11 Beav. 497; *Great Northern Company* v. *Manchester Company*, 5 De G. & Sm. 138; *Greene* v. *West Cheshire Company*, Law Rep. 13 Eq. 44; *Hood*

v. *Northeastern Company*, 8 id. 666; *Raphael* v. *Thames Valley Company*, Law Rep. 2 Ch. 147; *Lytton* v. *Great Northern Company*, 2 Kay & J. 394; *Dorsey* v. *St. Louis Company*, 58 Ill. 65; *Lloyd* v. *London Company*, 2 De G. & Sm. 568; *Johnstown* v. *Veghte*, 69 N. Y. 16; *Amedon* v. *Harris*, 113 Mass. 59; *Taylor* v. *Waters*, 7 Taunt. 39; *Colt* v. *Netherville*, 2 P. W. 304; *Buxton* v. *Lister*, 3 Atk. 387; *Rerick* v. *Kern*, 14 Serg. & R. (Pa.) 267; *Thurman* v. *Clark*, 3 Stock. (N. J.) 306; *Clavering* v. *Clavering*, Mos. 224; *Wilson* v. *Wilson*, 14 Sim. 405, affirmed 5 H. of L. Cas. 40; *Pembroke* v. *Thorpe*, 3 Swans. 436, 443; *Nelson* v. *Bridges*, 1 Jur. N. S. 753; *Anon.*, 2 Free. Ch. 253; *Thomson* v. *Harcourt*, 2 Bro. P. C. 415; *Odessa Tramways Co.* v. *Mendall*, 37 L. J. N. S. 275.

A receiver has, prior to a final decree, no larger rights than those which appertain to the owner of the property sequestered. If the property in the possession of the owners was lawfully incumbered, he cannot, *sua sponte*, and without judicial proceedings, dispute such incumbrance. *Receivers* v. *Patterson*, 3 Zab. (N. J.) 283; *Hyde* v. *Lynde*, 4 N. Y. 387; *Bell* v. *Shipley*, 33 Barb. (N. Y.) 610; *Lincoln* v. *Fitch*, 42 Me. 456.

The railroad company was properly made a defendant. At the time of suit brought, it was the owner in fee of the right of way, and the sole owner of the rolling-stock, the right to use which was granted by the contract. *Railroad Company* v. *Orr*, 18 Wall. 471; *Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299; *Story* v. *Livingston*, id. 357.

Mr. A. S. Merrimon, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the court which had appointed the receiver, and punishable as such. *Davis* v. *Gray*, 16 Wall. 203.

The citizenship of the complainant corporation is sufficiently averred. *Express Company* v. *Kountz Brothers*, 8 id. 342.

Such a complainant need not prove its existence, unless the fact is directly put in issue by the defendant. *The Society for the Propagation, &c.* v. *The Town of Paulet*, 4 Pet. 480.

To the objection that the requisite corporate power of the complainant is not shown, there are two answers. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. 2 Waite, Actions and Defences, 334.

The charter is set out in the record, and forms a part of it. That leaves no room for doubt upon the subject.

Adequate capacity on the part of the railroad company to make the contract is to be presumed in like manner.

No party defendant was necessary but the receiver. He was in the possession of the property and effects of the railroad company, subject to the order of the court, and could have specifically performed the contract, or paid back the money loaned if the court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them. *Davis* v. *Gray*, *supra*; *Doggett* v. *Railroad Company*, *supra*, p. 72.

The contract between the express company and the railroad company was that the latter should give to the former the necessary facilities for the transaction of all its business upon the road, forward without delay by the passenger trains both ways all the express matter that should be offered, do all in its power to promote the convenience of the express company, both at the way and terminal stations, and carry free of charge the messengers in charge of the express matter, and the officers and agents of the express company passing over the road on express business. The consideration for these stipulations was a loan by the express company to the railroad company of $20,000, to be expended in repairs and equipments for the road, the loan to bear interest at the rate of six per cent per annum, and the payment of fifty cents per hundred pounds for all express matter carried over the road, to be applied in discharge of the loan and interest. The contract was to continue for one year from the first day of January, 1866, and until the principal and interest of the debt should be fully paid. The bill avers that the receiver had refused to carry out the contract,

and that the principal of $20,000 and a part of the interest were unpaid.

The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous in both English and American jurisprudence. They proceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice, that it would be less beneficial than relief in equity, that the damages would not be an accurate satisfaction, that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty.

Judge Story, after an elaborate examination of the subject, thus lays down the general rule: "The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy." 2 Story, Eq. Jur., sect. 728. See also *Stuyvesant* v. *The Mayor, &c. of New York*, 11 Paige (N. Y.), 414; *Barr* v. *Lapsley*, 1 Wheat. 151; *Storer* v. *The Great Western Railway Co.*, 2 You. & Coll. 48; *Wilson* v. *Furness Railroad Co.*, Law Rep. 9 Eq. 28.

But we need not pursue the subject farther, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. Frye, Specif. Perform. 64.

The contract stipulates that after the first year it shall cease upon the payment of the $20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity.

There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment

which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can thus be diverted.

The appellant can, therefore, have no *locus standi* in a court of equity.

Both these objections appear by its own showing. It was, therefore, competent and proper for the court below, *sua sponte*, to dismiss the bill for the want of equity upon its face. *Brown et al. v. Piper*, 91 U. S. 37.

Decree affirmed.

GODDEN v. KIMMELL.

In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law; in many other cases they act upon the analogy of the limitations at law; but even where there is no such statute governing the case, a defence founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

The case was argued by *Mr. James M. Johnston* and *Mr. John Scott* for the appellant, and by *Mr. Calderon Carlisle* and *Mr. George F. Appleby* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forums as a means of promoting uniformity of decision.

Stale claims are never favored in equity, and where gross laches is shown and unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time,

even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim. *Stearns* v. *Page*, 7 How. 819; *Badger* v. *Badger*, 2 Cliff. 154.

Time, it is said, is no bar to an established trust, which may be true in cases of concealed fraud, provided the injured party is not guilty of undue laches subsequent to its discovery. Circumstances of the kind form an exception to the rule; but the rule still is, that when a party has been guilty of such laches in prosecuting his equitable remedy as would bar him if his title was solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting titles. *Michaud* v. *Girod*, 4 How. 561.

It appears that the complainants are, or claim to be, creditors of Edwin Walker, deceased, and that they instituted the present suit in behalf of themselves and other creditors of the deceased to recover a moiety of certain real and personal property, together with the rents and profits of the same, which, as they allege, belonged to their creditor in his lifetime and at the time of his decease. They allege that their creditor owned and held the property described in the bill of complaint in common with one Abram F. Kimmell, of the city of Washington, since deceased, with whom he was carrying on the livery-stable business, under the firm name of Walker & Kimmell, the said property being used for the purposes of said business; that the said Walker being largely indebted to the complainants, their testators and intestates, as well as other parties, dissolved partnership with said Kimmel and conveyed all his real and personal estate, after payment of all partnership debts, to one Voltaire Willett, by deed dated Oct. 8, 1857, in trust to pay off the complainants, their testators and intestates, with the proceeds thereof, the remainder to be paid over to the grantor, his heirs and assigns. Possession of the property at the time was in the junior partner; and the complainants allege that he continued in the possession thereof up to the day of his death, holding the same and applying the proceeds thereof to his own use, without accounting for the rents and profits, either to the grantor, the trustee, or to the creditors, and that since his death the property has been in the possession of his widow and children, who have appropriated the same to their own use, and that

they utterly deny all right of the complainants to any part or interest in the same.

Sufficient appears from the preceding statement to show what the circumstances were on the first day of February, 1871, when the present bill of complaint was filed against the respondents in the subordinate court. They are Mary A. Kimmell, administratrix of Abram F. Kimmell, deceased, his four children, the heirs of the deceased trustee, and the administrator of the deceased senior partner, who, as alleged, was the debtor of the complainants.

Service was made; and the respondents appeared and filed answers, setting up several defences, the most material of which are contained in the answer of the widow and children of the deceased junior partner. They deny all the material allegations of the bill of complaint, to the effect following: —

1. That the complainants or either of them are creditors of the deceased senior partner of the firm, or that the senior partner of the firm was ever the owner of the real estate described in the bill of complaint, or that he ever owned or possessed any personal property, or that the deceased junior partner ever had in his possession any personal property which belonged either to the deceased senior partner or to the firm.

2. They admit the death of the trustee, but they aver that they are not informed and cannot state whether he ever did any thing in discharge of the trusts created by the said deed, and they also admit that the trustee and the deceased junior partner made the alleged conveyance to the brother-in-law of the latter, but they aver that it was made in good faith, and that the moiety of the consideration belonging to the senior partner was appropriated to pay his just debt, as fully explained in the answer.

3. They also allege as a defence that the debtor of the complainants left Washington in the year 1846; that he went to Richmond and entered into business there with a new partner; that he there contracted large debts for which he was liable; that in the latter part of 1857 he conveyed to his new partner a large amount of real and personal property to pay all his debts, including those set up by the complainants; that all these claims were fully satisfied and extinguished either by payment

in money or by the acceptance of other securities; and that the supposed debtor of the complainants, at the time of the dissolution of the partnership here, before he went to Richmond, relinquished all interest in the future earnings of the concern, and that the partnership as between the parties was dissolved, though they admit that no formal notice of the dissolution was published.

4. They also admit that besides the real estate there was at the time on hand a large stock of horses, vehicles, and other property, all of which was taken by the junior partner; but they aver that the junior partner from time to time made payments and advances to the retired partner exceeding in amount the value of his interest in the assets of the partnership, as estimated by himself; and they aver that no formal settlement of accounts ever took place, but they allege that if one could be made, which, as they state, it would be difficult and expensive to accomplish, it would be found that the estate of the debtor of the complainants is largely indebted to the estate of the junior partner.

Finally, they set up as defence to the suit that the claims are stale demands, and of a character that courts of equity will not countenance, because, as they allege, it would now be inequitable and unjust that the complainants should be permitted to enforce an account from the respondents, after having slept upon their rights, if any they have, for so long a time and until all the parties to the transaction are dead.

By consent the cause was referred to an auditor, with instructions to ascertain and report what amount, if any, was due to the respective complainants, and to ascertain and state the partnership accounts and the character of the partnership property at the date of the trust-deed, and the disposition made of the rents and profits by the respondents. Hearing was had before the auditor, and he made the report set forth in the transcript.

Testimony was taken by the complainants prior to the order of reference, and they took further testimony before the examiner subsequent to the appointment of the auditor. By his report it appears that two schedules were attached to the deed of trust, one of which purported to be a list of drafts, notes, and

bonds due to a third person, and the other to be a list of debts due by the debtor to the complainants. Among other things, the deed recited that the said debtor, independently of his indebtedness to the firm of which he was a member, owed a large amount to the persons named in the two schedules, and that he desired, after paying all the firm debts, to secure *pro rata* the debts in the first schedule, and if sufficient was left after that, to pay in full the debts in the second schedule.

It appears that the deed was duly executed, and that the grantor conveyed to the trustee, his heirs, executors, administrators, and assigns for ever, all of his right, title, and interest in and to the real and personal property, debts, effects, credits, and assets of every kind whatever and in any manner belonging to the firm, subject to the debts and liabilities of the firm and to the right of the junior partner in winding up and paying off the same, the true intent and meaning of the instrument being only to convey the interest of the senior partner after all the liabilities of the firm have been discharged. Matters of the kind being fully explained, the auditor proceeds to report that he has not stated the claims of the respective complainants; and he gives the reasons for the omission, which appear to be satisfactory, as the report shows that the complainants did not furnish the means to enable him to comply with that direction, except perhaps in the single instance fully set forth in the report.

Directions were also given by the decretal order that the auditor should state the partnership accounts, which he also failed to do, for the satisfactory reason, as he states, that no testimony or other material was furnished by the parties to enable him to perform the required service. Another direction of the decretal order was to state the amount of the property belonging to the firm at the date of the trust-deed. For a compliance with that order, so far as the real estate is concerned, the auditor refers to the deeds introduced in evidence before the examiner, and in respect to the personal property he states that there was no evidence given to show what, if any, belonged to the partnership at that date.

Lots numbered 16, 17, and the west half of 18, in the square numbered 491, were included in the trust-deed. On the 16th

of November, 1858, the junior partner and his wife, the trustee of the senior partner joining with them, conveyed the west half of lot 18 and part of lot 17 to the trustee of the sister-in-law of the first-named grantor, in respect to which the auditor reports that the deed conveying the same refers to the prior deed of trust given by the senior partner, and he states that the recitals of the deed specify the purpose for which it was executed, and show that the firm owed the *cestui que trust* the sum of $2,000 money loaned, and that the property was conveyed to her for the sum of $5,000, one-half of which went to pay that debt and interest, and the other moiety was paid or secured to the junior partner of the firm.

Six years later the grantee in the deed reconveyed the same to her brother-in-law for five dollars, as expressed in the consideration of the deed. Complainants charge in the bill of complaint that the junior partner fraudulently procured the conveyance to be made in order to secure the title to himself; but the respondents in their answer deny all fraud and bad faith in the premises, and the auditor reports that no testimony was given touching the conveyance. Instead of that, he states, in response to that charge, that while the circumstances attending the conveyance may be well calculated to cast suspicion upon it, he finds nothing in the case to warrant him in pronouncing it fraudulent and void.

Where the answer of the respondent is responsive to the bill it is evidence in his favor, and is conclusive, unless disproved by more than one witness. Story, Eq. Plead. (7th ed.), sect. 875 *a*; *Daniel* v. *Mitchel*, 1 Story, 188.

Two witnesses, or one witness with confirmatory circumstances, are required to outweigh an answer asserting a fact responsive to the bill, the reason for the rule being that when the complainant calls upon the respondent to answer an allegation he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness; and as the complainant cannot prevail unless the balance of proof is in his favor, he must have circumstances in addition to his single witness, else he fails to establish the affirmative of the issue. *Clark's Executors* v. *Van Reimsdyk*, 9 Cranch, 153; *Hughes* v. *Blake*, 6 Wheat. 453.

Chancery courts invariably hold, where the answer is responsive to the bill and positively denies the matters charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor; and unless it is overcome by the testimony of two credible witnesses, or of one witness corroborated by other facts and circumstances which give it greater weight than the answer, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill. *Badger* v. *Badger*, *supra*.

Only one witness was examined before the auditor as to the rents and profits received by the respondents, and the report of the auditor states that the annual rental value of the property, excluding that charged to have been fraudulently conveyed, was only $938, and if that be excluded, then the real estate consists only of lot 16 in square 491, with the improvements.

Ten exceptions to the auditor's report were filed by the complainants, alleging for error that he did not report their respective claims as liens against the property in controversy. Pursuant to the order of the court the parties were heard upon the auditor's report and the exceptions thereto, and the court entered a decree that the bill of complaint be dismissed, from which decree the complainants appealed to the general term, where the decree of the subordinate court was affirmed.

Proceedings in the court below being ended, the complainants appealed to this court, and filed the following assignment of errors: 1. That the court erred in not entering a decree cancelling and setting aside as fraudulent the said conveyance to the sister-in-law of the junior partner. 2. That the court erred in not entering a decree that the real estate transferred to the trustee of their debtor should be sold and distributed to his creditors. 3. That the court erred in not entering a decree that the administratrix of the junior partner should account and pay to the trustee to be duly appointed so much of the personal assets of the firm included in the trust-deed as were held by her intestate in his lifetime. 4. That the court erred in dismissing the bill of complaint. 5. That the court erred in not entering a decree that the representa-

tives of the deceased junior partner should account for the rents and profits of the real estate conveyed to the trustee up to the date of the decree in this cause.

That the partnership existed is not denied; and the proof is clear that the senior partner left Washington in 1846, and that he went to Richmond and there formed a new partnership, and engaged largely in business for twenty years before his death. As before remarked, the right of the complainants, if any, to prosecute the suit sprang from the trust-deed dated Oct. 8, 1857, and executed by their alleged debtor to his trustee for the purpose of paying his debts, including what he owed to the complainants. Annexed as the deed is to the bill of complaint, it may properly be referred to as an exhibit, from which it appears that their debtor and the intestate of the first-named respondent were "engaged as partners in the city of Washington, and in the progress of the business acquired real and personal estate, including horses, carriages, buggies, sulkies, and other property," and that they held claims against various persons, and that the senior partner was independently indebted to the persons named in the schedules appended to the deed; that he conveyed all his right, title, and interest in the real and personal property, debts, effects, credits, and assets of the firm to the grantee of the trust-deed for the described purposes, subject to the debts and liabilities of the firm, and the right of the junior partner in winding up and paying off the same.

There is no averment in the bill that any interest in the partnership property was ever collected by the trustee, or that he could have made any such collection, nor is it averred that any of the complainants are judgment creditors.

Fourteen years elapsed from the date of the deed to the filing of the bill, and throughout that period none of the complainants during the lifetime of the partners and trustee or any of them, took any step whatever to ascertain or enforce their rights, if any they had, under that trust-deed. Nothing appears to show that the trustee ever took any beneficial title whatever to the real property. Beyond doubt, he took the legal title by the words of the deed; but there is no proof to show that he ever acquired the possession or the right of

possession, it appearing by the deed that the right of possession was secured to the junior partner, for the purpose of winding up the partnership.

Concede that the grantor might have joined the trustee in a suit for an account on his own motion or at the suggestion of the trustee or creditors, still the answer to that suggestion, if made, is that he did not do so; and now the grantee, the trustee, and the junior partner all being dead, unless there can first be an account of the partnership property, the complainants can obtain no relief, as there is nothing on which a decree in their favor could operate for their benefit. They do not allege that there was ever any settlement of the partnership affairs, nor do they in terms pray in the bill for an account of the partnership assets. By consent an auditor was appointed to ascertain and state the partnership accounts, but he characterizes the proceedings in the cause as involved in obscurity, and the testimony "as incomplete, vague, and indefinite," and reports that there is only one instance in which the amount due to any one of the complainants has been proven with any reasonable degree of certainty. Except the prayer that the administratrix and heirs of the junior partner account with and pay over to the complainants the rents and profits of the estate conveyed to the trustee, the bill of complaint contains nothing which can possibly be construed as a prayer for an account of the assets of the partnership.

Four lots, to wit, 16, 17, 18, and 19, the complainants claim were held and used as partnership property; but the answer of the principal respondents denies that claim, and avers that the firm never owned any of the real estate mentioned, except lot 16 and parts of lots 17 and 18; and the auditor reports that, excluding the property conveyed to the other trustee, the assets consist only of lot 16 with the improvements on the same, and that there is not a particle of testimony to prove that the conveyance to the other trustee was fraudulent. Attempt is made to set aside that conveyance without making either the trustee or *cestui que trust* parties to the bill, though it is said by the complainants that they are both alive, of which, however, there is no proof in the record.

Exceptions to the auditor's report were taken by the com-

plainants because he did not report as liens against the property described in the cause the claims of each and every complainant, when his report shows that the evidence given did not enable him, except in one instance, to ascertain the amount of the claims, which was much less than the minimum of jurisdiction.

For fourteen years the complainants slept upon their rights, and there is not a single allegation in the bill nor a particle of proof introduced in their behalf to excuse their manifest laches in not seeking an account until all the parties in interest have departed this life.

Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases, and this rather in obedience to the Statute of Limitations than by analogy. *Wagner* v. *Baird*, 7 How. 234. In many other cases they act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate. *Moore* v. *Greene*, 2 Curt. C. C 202; 2 Story, Eq. Jur. (8th ed.) 520; *Farnum* v. *Brooks* 9 Pick. (Mass.) 243.

Support to those propositions is found everywhere; but there is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim where no Statute of Limitations governs the case. Such courts in such cases often act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Badger* v. *Badger*, *supra*; *Roberts* v. *Tunstall*, 4 Hare, 269; *Stearns* v. *Page*, *supra*.

Authorities to support that proposition are numerous and decisive, nor is it necessary to look beyond the decisions of this court for the purpose. Lapse of time, said Mr. Justice Thompson, and the death of the parties to the deed have always been considered in a court of chancery entitled to great weight and almost controlling circumstances in cases where the controversy grows out of stale transactions. *Jenkins* v. *Pye*, 12 Pet. 241;

Beckford v. *Wade*, 17 Ves. 96; *Humbert* v. *Rector*, 7 Paige (N. Y.), 198.

Few cases can be found more nearly analogous to the case before the court than the one in which the controversy had its origin in this district. It had respect to a deed of trust executed to secure certain creditors named in the schedule annexed to the deed. Enough appears to show that the deed was filed by the trustee himself within twenty years, and that the subordinate court decreed that the amount of debts enumerated in the schedule should be paid. Appeal from that decree was taken to this court, and Mr. Chief Justice Taney, in disposing of the case and reversing the decree, remarked as follows: "We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the Statute of Limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the Statute of Limitations, courts of equity refuse to interfere after considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost." *McKnight* v. *Taylor*, 1 How. 168.

Corresponding views were expressed by Mr. Justice Story prior to that time, and the Chief Justice referred to the same as having settled the doctrine of the court upon the subject. *Piatt* v. *Vattier*, 9 Pet. 416; *Smith* v. *Clay*, Amb. 645.

Courts of equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she

first came to the knowledge of their rights. *Badger* v. *Badger*, 2 Wall. 87; *White* v. *Parnther*, 1 Knapp, C. C. 227.

When a party appeals to the conscience of the Chancellor in support of a claim, says Mr. Justice Field, where there has been laches in prosecuting it or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the Chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the Statute of Limitations contained in the answer. *Marsh* v. *Whitmore*, 21 Wall. 185.

Laches and neglect, says Mr. Justice Swayne, are invariably discountenanced in equity, and therefore there has always been a limitation of suits in such courts from the beginning of their jurisdiction. Limitations of the kind are dictated by experience and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof. *Brown* v. *County of Buena Vista*, 95 U. S. 161.

Difficulties often arise in controversies of the kind in getting at the truth so as to administer justice with any thing like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the case, and it is not improbable that many or all of their clerks and agents may be inaccessible as witnesses, for the same or some other reason, or if alive and their attendance as witnesses may be secured, they may not be able to remember any thing about the transactions.

Viewed in the light of these authorities and suggestions, the court is of the opinion that the last defence set up in the respondents' answer is fully maintained, and that there is no error in the record.

Decree affirmed.

VANSANT v. GAS-LIGHT COMPANY.

Unless allowed in open court during the term at which the decree was rendered, an appeal will be dismissed, if no citation has been issued and the appellee does not appear.

MOTION to dismiss for want of citation an appeal from the Supreme Court of the District of Columbia.

This was a bill in chancery brought in the Supreme Court of the District of Columbia by John Vansant, and William A. Duncan, trustee for Susan A. Duncan, against the Electro-Magnetic Gas-Light Company and others. The defendants answered; and the cause coming on to be heard upon the pleadings and proofs, a final decree was rendered at the special term, which was affirmed at the general term of that court. The following entry then appears upon the record: —

"JOHN VANSANT *et al.*
v.
THE ELECTRO-MAGNETIC GAS-LIGHT CO. } No. 3707. Equity Doc. 18.

"DEC. 17, 1875.

"The clerk will enter an appeal to the Supreme Court of the United States from the decision in general term, passed Nov. 29, 1875.

"DURANT & HORNOR,
"*For Plaintiffs and Appellees.*

"Dec. 17, 1875. Appeal entered as directed.
"By the clerk."

It was conceded that a bond had been approved by the Chief Justice of that court and filed with the clerk during the term.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* in support of the motion.

Mr. Thomas J. Durant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

No citation has been issued in this cause. A citation only becomes unnecessary when the appeal is allowed in open court

during the term at which the decree is rendered. This implies some action of the court while in open session, and, to be regular, should be entered on the minutes. Here, although an appeal bond was approved by the Chief Justice of the court and filed with the clerk during the term, it does not appear to have been done while the court was actually in session. So far as the record shows, it was the act of the Chief Justice alone out of court. The entry on the order-book is simply a direction to the clerk, by the solicitor of the appellant, to enter an appeal. It in no way indicates any action whatever either in or by the court.

Appeal dismissed.

SUPERVISORS v. GALBRAITH.

1. An act of the legislature of Mississippi, approved Feb. 10, 1860, authorized the county of Calhoun, among others, to subscribe to the capital stock of a railroad company, provided that at an election in the county, of which and of the amount to be subscribed, and in what number of instalments, twenty days' notice should be given, a majority of the qualified electors voting should be in favor of the subscription. The proposition, when first submitted, was rejected; but at a second election the vote was in favor of the subscription. An act, passed March 25, 1871, declared that the bonds issued in payment of previous subscriptions should be made payable to the president and directors of the company and their successors and assigns. The bonds were issued Sept. 1, 1871, payable to the railroad company, or bearer, ten years thereafter, at the agency of the company in the city of New York. They recite that they are issued in payment of the county subscription to the capital stock of the company, in pursuance of the said acts, and in obedience to a vote of the people of the county, at an election held in accordance therewith. In a suit on the bonds, — *Held*, 1. That the requirement that they should be made payable to the president and directors of the company, and their successors and assigns, is only directory; and that the recital therein estops the county from taking any advantage of the irregularity committed by its servants. 2. That no place of payment having been designated by the act, it was competent to make the bonds payable in New York. 3. That as in that State they could, after being assigned in blank, pass by delivery from hand to hand, and have all the properties of commercial paper, the result is the same as if they had been drawn in literal conformity with the statute. 4. That, in the absence of any prohibition in the act against more than one submission to the electors of the question of making the subscription, the second vote was not unlawful.

2. The fourteenth section of the Constitution of Mississippi, ratified Dec. 1, 1869, which declares that "the legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or a regular election, to be held therein, shall assent thereto," is wholly prospective. It does not abrogate previous acts of the legislature conferring authority to subscribe for stock.

ERROR to the District Court of the United States for the District of Mississippi.

This was an action brought by William B. Galbraith, a citizen of Tennessee, against the board of supervisors of Calhoun County, Mississippi, on certain bonds and coupons thereto attached. The bonds are in the words and figures following, except as to the numbers and amounts, and a copy of one of the coupons is hereto annexed. They differ only as to the time of payment and the reference to the bond to which they are attached.

"*Bond No.* ——.

"COUNTY OF CALHOUN, STATE OF MISSISSIPPI.

"500.] [500.

"Be it known that the county of Calhoun, State of Mississippi, is indebted unto and promises to pay the Grenada, Houston, and Eastern Railroad Company, or bearer, at the agency of said company in the city of New York, two years from the date hereof, five hundred dollars, lawful money of the United States of America, with interest at the rate of eight per cent per annum, payable semi-annually on the first day of March and September of each year, on the presentation and surrender of the proper coupon hereto annexed.

"This bond is one of a series of bonds issued and delivered to the Grenada, Houston, and Eastern Railroad Company by Calhoun County, to meet and pay off the amount subscribed by said county to the capital stock of the railroad company aforesaid, in pursuance of an act of the legislature of the State of Mississippi, entitled 'An Act to aid in the construction of the Grenada, Houston, and Eastern Railroad,' approved Feb. 10, 1860, and of an act amendatory thereof, passed March 25, 1871, and in obedience to a vote of the people of said county at an election held in accordance with the provisions of said acts.

"In witness whereof, the board of supervisors of said county have caused the signature of the president of said board to be hereto

affixed, countersigned by the clerk, with his official seal affixed, and who have also signed the coupons hereto attached at their office in Pittsboro', this first day of September, 1871.

(Signed) "JOEL ABNEY,
"*Pres't B'd of Supervisors.*

"J. S. RYAN, *Clerk.*"

"*Coupon.*

"UNITED STATES OF AMERICA:

"$4.00.] [$4.00.

"The county of Calhoun will pay to the Grenada, Houston, and Eastern Railroad Company, or bearer, four dollars at their agency in the city of New York, on the first day of March, 18—, being six months' interest on bond No. ——.

(Signed) "JOEL ABNEY,
"*Pres't B'd Supervisors.*

"J. S. RYAN, *Clerk.*"

In addition to the plea of *nil debet*, the defendant filed several special pleas, all of which were demurred to. The demurrers were sustained, and judgment was rendered against the defendants. They then sued out this writ. Their assignment of errors is referred to, and the remaining facts are set forth in the opinion of the court.

Mr. Philip Phillips for the plaintiffs in error.
Mr. Wiley P. Harris, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The question presented for our determination in this case is as to the validity of certain bonds issued and delivered by the board of supervisors of Calhoun County, in the State of Mississippi, in payment for stock of the Grenada, Houston, and Eastern Railroad Company, for which the supervisors subscribed in behalf of the county. In the court below they filed numerous pleas, presenting the points of defence upon which they relied. The pleas were all demurred to, the demurrers were sustained, and judgment was rendered for the plaintiff. Here the assignments of error are not numerous. We shall respond as far as we deem necessary without formally restating them.

The act of Feb. 10, 1860, authorized the subscription, pro-

vided a majority of the voters of the county signified their approval. That sanction was given, and the stock was subscribed. The amendatory act of March 25, 1871, declared that when bonds were issued in payment for such stock they should be "signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the Grenada, Houston, and Eastern Railroad Company, *and their successors and assigns*, and may be assigned, sold, and conveyed with or without guarantee of payment by said president and directors, or may be mortgaged in like manner, at their discretion, as they may deem best for the company." The bonds here in question bore date Sept. 1, 1871, and were payable to "*the Grenada, Houston, and Eastern Railroad Company, or bearer*, at the agency of said company in the city of New York, two years from date." Each bond was for $500, with interest coupons attached, which matured half-yearly On their face is this recital: —

"This bond is one of a series of bonds issued and delivered to the Grenada, Houston, and Eastern Railroad Company by Calhoun County, to meet and pay off the amount subscribed by said county to the capital stock of the railroad company aforesaid, in pursuance of an act of the legislature of the State of Mississippi, entitled 'An Act to aid in the construction of the Grenada, Houston, and Eastern railroad,' approved Feb. 10, 1860, and of an act amendatory thereof, passed March 25, 1871, and in obedience to a vote of the people of said county at an election held in accordance with the provisions of said acts."

An objection is made to the form of the bonds. It is said they should have been made payable to the railroad company and "their successors and assigns," and not to the company "*or bearer*," and it is insisted that this divergence from the prescribed formula is a fatal defect.

To this there are several answers. The statutory requirement in this particular is only directory. *Indianapolis Railroad Co.* v. *Hurst*, 93 U. S. 29; *Township of Rock Creek* v. *Strong*, 96 id. 271. The defect is one of form and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it. *Bargate* v. *Shortridge*, 5 Clark H. L. 297. The recital in the

bonds of conformity to the statutes is also conclusive. A buyer was not bound to look further. Bigelow, Estoppel, 266; *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; *Moran* v. *The Commissioners*, 2 Black, 722. No place of payment of the bonds being designated by the statute, it was competent for the supervisors to make them payable in New York. *Meyer* v. *Muscatine*, 1 Wall. 384. The law of the place of performance governed the construction and effect of the contract. *Brabston* v. *Gibson*, 9 How. 263; *Cook* v. *Moffat*, 5 id. 295. By the law of New York such bonds may be assigned in blank, and any holder can fill the blank with his own name or otherwise. In the mean time, after such assignment in blank, they pass by delivery from hand to hand, and have all the properties of commercial paper. *Hubbard* v. *The New York & Harlem Railroad Co.*, 36 Barb. (N. Y.) 286. The result is, therefore, the same that it would have been if they had been drawn in literal conformity to the statute.

The requirement of the statute in this particular is evidently the result of inadvertence. It applies to the securities spoken of the language necessary in a deed intended to vest in a corporation a fee-simple title to real estate. They were obviously intended to be made negotiable instruments. *Mayor of Vicksburg* v. *Lombard*, 51 Miss. 111.

It appears by the record that the proposition for subscription was twice submitted to the voters. The first time it was rejected; the second, it was approved by a majority. It is contended that the first submission exhausted the power to submit, and that the second was a nullity. We cannot concur in this view.

The first section of the act of 1860 gave ample power to the proper officers (then the board of police, afterwards the board of supervisors) to subscribe, upon conditions thus expressed: —

"*Provided, however*, that an election shall be held in the county for and on account of which stock is proposed to be subscribed by the qualified electors thereof, at the regular precincts of said county, twenty days' notice of the time of holding such election, and of the amount proposed to be subscribed, and in what number of instalments, being first given by the board of police; and if, at said election, a majority of the qualified electors voting shall be in favor of

such subscription, then said board shall make such subscription for and in behalf of the county, for the amount specified, by the president of said board of police, subscribing the amount so specified, to the capital stock of said company, but if a majority of those voting shall be opposed to such subscription, the same shall not be made."

The remaining sections provide for the collection of the amount subscribed, by taxation, the mode of collection, &c., if the subscription should be made.

There is no limitation as to the time when, or the number of times, the voters might be called upon to decide the question of subscription. We cannot recognize any restriction as to the latter, in this respect, without adding to the statute what it does not contain. Our duty is to execute the law, not to make it. Such an interpolation would involve the "judge-made law" which Bentham so earnestly denounces. If authority be needed in support of our construction of the clause, it will be found in *The Society, &c.* v. *New London*, 29 Conn. 174.

The present Constitution of the State of Mississippi, ratified Dec. 1, 1869, declares: —

"SECT. 14. The legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto."

The learned counsel for the plaintiff in error insists that this section abrogated the act of 1860, and avoids the bonds.

It will be observed that the language of the section is wholly prospective. It is, in effect, that the legislature shall not, in the future, authorize any county, city, or town (without the consent of two-thirds of the legal voters) to do either of two things: 1. Become a stockholder in any company, association, or corporation. 2. Lend its credit to any company, association, or corporation.

The restraint is upon the legislature. It is forbidden to do thereafter either of the two prohibited things.

The act which authorized the subscription here in question, and under which it was made, was passed more than nine years

before the Constitution took effect. As to this act there is no room for any doubt or question. It provided for the payment of the subscription by a tax equal to the amount subscribed.

The amendatory act of 1871, as regards the point under consideration, only changed the mode of payment for the stock. Instead of payment by a tax imposed for that purpose, it provides "that it shall and may be lawful" for the supervisors to issue bonds for such sums as "may be deemed necessary to meet, pay off, and discharge the subscriptions" made theretofore or thereafter under the prior act of 1860.

The eighth section requires the levy and collection of sufficient taxes to pay in due time the amount due upon such subscriptions, or upon the bonds given for their payment.

In neither case was there to be a loan of any kind to the railroad company, and certainly none of "the credit of the county." The constitutional prohibitions do not, therefore, apply in any wise to this case.

The act of 1871 recognizes the distinction between subscriptions made under it and those made under the act of 1860. The former permitted subscriptions by towns, which were not authorized by the latter. In relation to such subscriptions the constitutional majority of two-thirds of the voters was required.

Our construction of the clause here in question has been given to like language in constitutions elsewhere, under similar circumstances. There are several adjudications of this court exactly in point touching the Constitution of Missouri. *County of Henry* v. *Nicolay*, 95 U. S. 619; *County of Callaway* v. *Foster*, 98 id. 567; *County of Scotland* v. *Thomas*, 94 id. 682; *County of Macon* v. *Shores*, 97 id. 272. See also *The State ex rel. Mo. & Miss. Railroad Co.* v. *Macon County Court*, 41 Mo. 458; *State* v. *Greene County et al.*, 54 id. 540; *Cass* v. *Dillon*, 2 Ohio St. 607.

We find no error in the record.

Judgment affirmed.

MR. JUSTICE MILLER, MR. JUSTICE BRADLEY, and MR. JUSTICE HARLAN dissented.

FARRELL v. UNITED STATES.

Debt on a bond given, under sect. 28 of the act of July 20, 1868 (15 Stat. 135), by a distiller with sureties, conditioned to be void if the obligors paid the taxes on the spirits deposited in the warehouse before their removal, and within one year from the date of the bond. Before the expiration of that time the spirits, while in the bonded warehouse in charge of an internal-revenue store-keeper, were destroyed by fire, without any fault, negligence, or carelessness on the part of the distiller, or of any person in charge of the distillery and warehouse who was in his employ. *Held*, that the obligors are liable to pay the taxes.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought April 12, 1872, on a bond bearing date June 13, 1870, executed by De Witt C. Farrell as principal, and Andrew W. Pinkney and John B. Smith as sureties, to the United States in the penal sum of $33,000, with condition to be void if the obligors or either of them should well and truly pay or cause to be paid unto the collector of internal revenue for the fifth collection district of Illinois the amount of taxes due and owing on the following-described distilled spirits, to wit: four hundred and forty-nine barrels, numbered from 4,951 to 5,449, both numbers inclusive, containing $32,182\frac{82}{100}$ proof gallons, which were entered for deposit in the distillery warehouse, No. 6, of D. C. Farrell, at Peoria, in the fifth collection district of Illinois, on the tenth day of June, 1870, before such spirits should be removed from such warehouse, and within one year from the date of the bond. The bond was taken pursuant to sect. 28 of the act of July 20, 1868, entitled "An Act imposing taxes on distilled spirits and tobacco." 15 Stat. 135. The breach assigned was that the tax of $16,116.50, to which said spirits were subject, had never been paid.

The defendants pleaded *non est factum*, and that they did not owe any part of the sum demanded. It was stipulated that the defendants might give in evidence under those pleas any matter of defence. The court to which the issues were submitted for trial found them for the United States. Judgment was rendered against the defendants for the penalty of

the bond, to be discharged on the payment of $15,502.27 and costs of suit.

It appears from a bill of exceptions that the court found as a matter of fact that the spirits were destroyed by fire July 27, 1870, without any fault, negligence, or carelessness on the part of said Farrell, or any person in charge of said distillery and bonded warehouse in his employment; that the spirits were so destroyed while in the bonded warehouse connected with his distillery, and that said warehouse was in the charge of an internal-revenue store-keeper.

The court ruled, as matter of law, that the defendants were liable for the tax.

The defendants, on the rendition of the judgment, sued out this writ. They assign for error that the court erred, —

1. In holding that the plaintiffs in error were liable for the tax mentioned in the bond sued on, notwithstanding the finding that, as matter of fact, the spirits upon which the tax was claimed were entirely destroyed by fire, without any fault, negligence, or carelessness on the part of said Farrell, or of any person in his employ in charge of the distillery and bonded warehouse in which they were stored.

2. In its application of the law to the facts, in this, in holding the plaintiffs in error to be liable, it clearly appearing that without their fault or negligence, from a period prior to the expiration of one year from the date of the bond sued on, it had not been, and at the time of the commencement of this suit it was not, in the power of the United States to deliver said spirits.

3. In finding the issues for the United States.

Mr. E. B. McCagg for the plaintiffs in error.

By the act of 1868, under which this bond was taken, the warehouse in which the spirits were stored was required to be, and the findings show that it was, a bonded warehouse of the United States, under the charge of a revenue store-keeper, assigned thereto by the commissioner of internal revenue. *United States* v. *Tinger*, 15 Wall. 111. It was, therefore, the duty of the government to safely keep the spirits thus in its exclusive custody until they were removed therefrom by the owner, on his paying the tax, at any time within twelve months

from the execution of the bond. The obligation to pay does not arise until he removes them. The recital that the tax was due and owing at the date of the bond was an unwarranted interpolation in that instrument, officially extorted, and void *United States* v. *Tingey*, 5 Pet. 114. It cannot work an estoppel, because it is not of the essence of the contract, but merely a mistaken construction of the statute. The United States could not, at that date, have maintained a suit against Farrel for the tax. It had no vested right, not even a right of action, until some breach of the bond had been committed. *Badlam* v. *Tucker*, 18 Mass. 284. No breach is committed if the tax be paid on the removal of the spirits; and this payment can only be made by purchasing stamps, each one of which must have a serial number, corresponding to that on the barrels. These stamps could not have been furnished after the destruction of the spirits.

Upon the payment of the tax the owner is entitled to an order for the delivery of the spirits. This is the provision of the statute; and the agreement of the government to deliver them on such payment will be inferred, although there be no express covenant to that effect. The government must therefore be in a condition to deliver before this action can be maintained. Having only the same rights and remedies, it incurs the same liabilities as a natural person. *United States* v. *Tingey*, *supra*; *Same* v. *Bradley*, 10 Pet. 343; *Same* v. *Hodge*, 6 How. 279; *Neilson* v. *Lagow*, 12 id. 98; *Dugan et al.* v. *United States*, 3 Wheat. 172; *Dixon* v. *United States*, 1 Brock. 177. To this contract there are reciprocal obligations. The government did not have the property in its possession for twelve months from the date of the bond. The plaintiffs in error were entitled to all that period before the right to the tax accrued, upon the delivery to them of the property; and having lost all the benefits of the contract, they are excused from performing their part of it. *Badlam* v. *Tucker*, *supra*; *United States* v. *Dixey*, 3 Wash. 15; *Same* v. *Mitchell*, id. 95; *Mounsey* v. *Drake*, 10 Johns. (N. Y.) 27; *Baylies* v. *Fettyplace*, 7 Mass. 325; *Irion* v. *Hume*, 50 Miss. 419.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The evidence given in the court below we cannot consider. It is improperly brought before us. The Circuit Court made no special finding of facts. All the finding it made was, that the high wines or distilled spirits mentioned in the distiller's warehousing bond were entirely destroyed by fire without any fault, negligence, or carelessness on the part of the distiller, or of any person in charge of the distillery and bonded warehouse in the employment of the distiller; that they were so destroyed while in the bonded warehouse connected with the distillery, and that the warehouse was in the charge of an internal-revenue store-keeper. The single question, therefore, is, whether these facts thus found relieve the obligors in the bond from liability to pay the government tax upon the liquors thus destroyed. We think they do not. The bond was dated on the 13th of June, 1870. It bound the obligors in a penal sum, conditioned to pay the taxes on the spirits deposited in the warehouse before their removal, and within one year from the date thereof. The obligation was unconditional, and it was exactly that which the distiller and his sureties were by the act of Congress required to assume. Act of July 20, 1868, sect. 28; 16 Stat. 135, 136. Depositing distilled spirits in a government warehouse did not make them the property of the government, or cause them to be held at the risk of the bailee. The property remained in the distiller, and the risk of loss by fire or any other casualty was consequently his. He and his sureties undertook to pay the government tax upon the spirits in the warehouse within one year, with no exception for any possible contingency. The judgment of the Circuit Court was, therefore, correct. The case of the distiller may be a hard one; but his misfortune is not the fault of the government. He might have protected himself by insurance, and possibly he did; or he might have obtained relief under the act of Congress of May 27, 1872, 17 Stat. 162. By that act Congress has provided a way in which a remission of the tax upon distilled liquors, casually destroyed while in the custody of a revenue officer in a bonded warehouse, may be obtained. The provision of such a mode of relief indicates a purpose to exclude any other.

Judgment affirmed.

UNITED STATES v. GLAB.

1. Brewers are included within the prohibition of the statute (14 Stat. 113; Rev. Stat., sect. 3232) that no person, firm, company, or corporation shall be engaged in or carry on any trade, business, or profession until he or they shall have paid the required special tax.
2. If such tax for one year has been paid by a firm of brewers, which before the expiration of the year is dissolved by the retirement of one partner, the other may carry on the same trade or business at the same place for the remainder of the year, without again paying such tax or any part thereof.

ERROR to the Circuit Court of the United States for the District of Iowa.

This was a civil action, brought Oct. 24, 1874, to recover the penalty imposed for carrying on the business of a brewer without having paid the special tax therefor required by the act of Congress. The case was submitted on an agreed statement of facts. On May 1, 1873, the defendant and his then partner paid their special tax for carrying on that business. The firm was dissolved August 1 of that year, by the defendant's purchasing the interest of his partner in the business; and he carried it on at the same place until the first day of May thereafter, without having paid any other tax therefor. The District Court gave judgment for the defendant, which was affirmed by the Circuit Court. The United States sued out this writ, and assigns for error the rendition of the judgment in favor of the defendant.

Mr. Assistant Attorney-General Smith for the United States.

The special-tax stamp issued to a firm looks to the transaction of the business by that firm only, and, in the absence of any statutory provision authorizing the use by its successor in business of the tax receipt, the stamp does not exempt from a special tax such successor, whether he is a former member of the firm or not; the stamp being a receipt merely, and not a license, as the court below erroneously regarded it.

There is no provision whereby one person can carry on business under a special-tax stamp issued to another, except in case of death or of removal, named in sect. 3241. The express mention of one thing is the exclusion of others. The specific provision for the cases named in that section may be justly con-

sidered as an intentional omission to provide for any other. The withdrawal of one partner operates as a dissolution of the original firm; and they who continue the business under a partnership subsequently formed constitute a new and different artificial person, subject to special tax from the time of commencing business. This view of the law is sustained by the last clause of sect. 3233, requiring the registration with the collector of the name, &c., of every person engaged in a business upon which a special tax is imposed, which clause provides that, "in case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be registered." A firm consisting of two persons pays no more special tax than an individual doing the same business; but when it is dissolved, such payment by it exempts neither partner who continues the business from liability to another tax, because each of them is a different "person" from the firm.

Each separate legal entity must be taxed for a specified business conducted at a designated place.

Mr. Thomas S. Wilson, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Brewers are properly regarded as included within the prohibition that no person, firm, company, or corporation shall be engaged in or carry on any trade, business, or profession until he or they shall have paid a special tax therefor in the manner provided in the act containing that prohibition. 14 Stat. 113; Rev. Stat., sect. 3232.

Persons engaged in business subject to such special tax are required to register with the collector of the district their names, style, place of residence, trade, or business, and the place where such trade or business is to be carried on; and the provision is that in case of a firm or company the names of the partners or persons constituting the same and their places of residence shall also be given, but that only one special tax shall be required of a partnership doing business at only one place.

By the record it appears that the suit in this case was commenced in the District Court, and that it was submitted and

tried upon an agreed statement of facts, which is in substance and effect as follows: That the defendant was the senior member of the firm named in the record; that the firm, prior to May 1, 1873, had been engaged in the business of brewing, and that they on that day paid the special tax as brewers of the first class for one year from that date, and took the proper receipt for the payment of the same; that they continued to prosecute the business for about three months thereafter, when the firm dissolved, and the defendant, having purchased the interest of the junior partner in the business, carried on the same in his own name at the same place for the balance of the year covered by the receipt, without again paying a special tax. Hearing was had, and the District Court rendered judgment for the defendant; and the plaintiffs excepted to the ruling, and removed the cause into the Circuit Court, where the parties were again heard, and the Circuit Court affirmed the judgment of the District Court.

Cases of the kind do not require a new bill of exceptions in the Circuit Court, as the hearing in this court, when the cause is removed here, is upon the bill of exceptions filed in the District Court. Pursuant to that rule, the cause was removed into this court by the present writ of error, and the plaintiffs assign for error that the judgment which was for the defendant should have been in favor of the plaintiffs.

Licenses were granted in such cases by the prior act, which in substance and legal effect was the same as the act under consideration, except that the term "special tax" is used in the place of the word "license." 13 Stat. 248; 14 id. 118; Rev. Stat., sect. 3232.

Persons, firms, companies, or corporations who manufacture fermented liquors of any name or description, for sale, from malt wholly or in part, or from any substitute therefor, shall be deemed brewers; and the provision is that brewers shall pay a special tax of $100, subject, of course, to the rule that no partnership doing business only at one place shall be required to pay more than one tax. When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators or other legal representatives, may occupy the house or premises and in like manner carry on,

for the residue of the term for which the tax is paid, the same trade or business as the deceased before carried on in the same house and upon the same premises, without the payment of any additional tax.

Exemption from any additional tax is also allowed when any person removes from the house or premises, for which any trade or business was taxed, to any other place; and in such event the provision is that he may carry on the specified trade or business in the place to which he removes without paying any additional tax under the regulations set forth in the proviso to the same section. Id., sect. 3241.

Enough appears in those provisions to show beyond all controversy that it is not the policy of the legislative department of the government to require the honest manufacturer to pay the special tax twice. Concede that, and still it is contended that the case of the defendant is not within the words of those exemptions, which may be safely admitted; but it is equally clear that the words of the act do not provide that in a case where a firm consisting of two partners have paid the special tax, and one of the firm purchases the interest belonging to the other, that the one who becomes the sole and exclusive owner of the trade or business may not carry on the same trade or business at the same place for the balance of the term for which the tax is paid.

Difficulty undoubtedly would arise if the partner remaining should associate with him another in the place of the outgoing partner, or if any change should be made in the trade or business, or if any change should be made in the place or premises where the trade or business was carried on, or where there was any just ground to conclude that it would open the door to any fraud or imposition, or to any loss of revenue or inconvenience to the revenue officers.

Nothing of the kind is charged in this case, nor is there any ground to suspect any thing of the kind in view of the facts exhibited on the agreed statement. No new member was admitted into the firm when the junior partner went out, nor is it pretended that the retiring partner ever attempted to pursue the business or trade in any other place, which it seems to the court brings the case within the equity of the provision that

the firm, though consisting of several members, may do business at one place without being required to pay more than one special tax.

Suppose the outgoing partner had died before the partnership had been dissolved, no one, it is supposed, would contend that the survivor would be required to pay another special tax for the balance of the term covered by the receipt held by the firm for the tax paid while both partners were in full life, and the court is of the opinion that the equity of the case disclosed in the record is equally strong in favor of the defendant.

Viewed in the light of these suggestions, it is clear that the United States lost nothing by the transaction, and the court is of the opinion that there is no error in the record.

Judgment affirmed.

KING v. UNITED STATES.

1. Where a tax long past due to the United States has been paid to the collector of internal revenue, he and his sureties are liable therefor, although the amount so paid had not then been returned to the assessor's office or passed upon by him, nor had a sworn return of the tax-payer been delivered.
2. The ruling in *The Dollar Savings Bank* v. *United States* (19 Wall. 227), that the obligation to pay the tax on dividends or interest does not depend on an assessment by any officer, and that a suit for such tax can be sustained without it, reaffirmed and applied to the present case.
3. The tax so paid is public money covered by the terms of the bond.

ERROR to the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. Edward Bissell for the plaintiffs in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court against Harry Chase and his sureties on his official bond as collector of internal revenue for the tenth district of Ohio.

King and his co-sureties alone join in the writ, and the case

having been submitted to the court below without a jury, the principal error assigned is that on the facts found by that court the judgment should have been in their favor.

The substance of the facts so found is, that while Chase was in office as collector, and while the defendants were liable on his bond for his official acts, he received from the treasurer of the Toledo, Wabash, and Western Railroad Company, as and for the tax on interest paid on their mortgage bonds, the sum of $24,923.87, which he did not pay into the treasury of the United States, and of which he neglected to render any account to the government. As it is on the particular circumstances of this payment to Chase that the defendants rely, it is necessary to state them with some care as they appear in the findings of the court.

It thus appears that on the first day of June, 1868, the railroad company was indebted to the United States, for the five per cent tax on interest paid by it on its mortgage bonds, the sum of $112,778, which was on that day paid to Chase in three checks of the treasurer of the railroad company on two different banks of Toledo, on which the money was paid to Chase by the banks.

The taxes for which this sum was paid included the whole amount of the taxes for the years 1865, 1866, and 1867. Of this sum there was due —

For the year 1865	$19,422.50
For the year 1866	44,821.25
For the year 1867	48,534.75

This entire sum, as we have said, was paid at the same time by two different checks of that date.

At the time of this payment there was delivered to Chase six separate returns of the taxes so due in the form prescribed by law to be made to the assessor of taxes, which were subscribed by the treasurer of the company, but not sworn to, and which had not then been filed with or delivered to said assessor, but all of which were delivered by Chase to the assessor, except the returns for the months of August, September, and October, 1867, which were the latest returns so delivered to Chase at the time the money was paid. These returns he did not

deliver to the assessor, nor did he make any mention of them in his report to the government at any time, and he retained the amount of them out of the money received from the treasurer of the company.

It was five years after this before the officers of the government discovered that he had received this sum above what he had accounted for, and in the mean time he had become insolvent.

The proposition of defendants' counsel is, that because this money was not received by Chase on any return made to the assessor, or on any assessment made by him or by the commissioner of internal revenue, for such taxes, and because the return delivered to Chase was not verified by oath, it was a voluntary deposit of the money in his hands by the treasurer of the company, and was not received by him in his official character. That it was not his duty to receive it for the government under such circumstances, and his sureties are not liable because it was an unofficial act. The argument has been pressed with great ingenuity and skill, and with many illustrations; but in all its forms it amounts to the averment that Chase had no legal authority as collector of internal revenue to receive the money for the government under the circumstances named, and the payment was not a lawful or valid payment.

There can be no question that Chase understood himself as receiving the money for the government, and in payment of the taxes due. Nor is there any question that the treasurer of the railroad company intended it as payment to Chase in his official character as collector, and supposed he had paid the taxes by so doing; for Chase gave him three separate receipts in which the taxes for each of the years we have mentioned are set out, and also the months of the year in which they accrued, which he signed officially as collector, and declared in each receipt that it was in full of the account. Nor can there be any doubt that these taxes were owing and then due to the United States; for the blank form used by the treasurer in making these returns shows that such returns were by law to be made to the assessor on or before the tenth day of the month following that in which the interest became due and payable,

and were to be paid to the collector on or before the last day of that month. The latest of the taxes in the case before us had long been due. Part of them had been detained by the railroad company over two years. All of them over six months. The company, by the returns which were handed to the collector, acknowledged the sums therein stated to be due, and tendered him the money. There can be no question raised as to the validity of the tender (because it was in bank checks indorsed good by the bank instead of money), unless objection had been made to the character of the tender.

The narrow question then is, whether, when a corporation presents to the collector a statement of taxes long past due, which taxes must in the end be paid to him, and tenders him the full payment of said taxes, he may not receive them and give a valid acquittance for the amount so received.

It is not necessary to decide that such a transaction would bar a recovery by the United States of any sum in excess of that paid, which might afterwards be found to be owing for the same period and for the same tax. The simple question is, was it a valid payment for that amount, and to that extent, which the collector might lawfully receive and be bound to pay to the government.

To hold the contrary is to decide that a debt long past due and acknowledged to be due by the debtor cannot be paid, when he is willing to pay, and the proper officer of the government ready to receive it, because the debtor has neglected to report the same facts to some other officer, or that officer has neglected to make report of the facts. Of the duty of the railroad company to pay the money as speedily as possible there can be no doubt. When it admitted the obligation and offered to pay it, was there no one to whom it could pay it?

Sect. 3142, Revised Statutes, then in force, provides for the appointment of a collector of internal revenue for every collection district. Sect. 3143, in prescribing the conditions of his official bond, makes it his duty to account for and pay over to the United States all public money which may come into his hands or possession, and this condition is in the bond which is the foundation of the present suit. Money paid for taxes past due and received by the collector as such, and for which he

gives a receipt as collector, specifying with precision the taxes for which it is paid, is public money. If it is not, whose money is it? The tax-payer has parted with it in voluntary payment of a debt due the United States. The collector appointed by the United States has received it as money paid to the United States on a debt due the United States. It is not, therefore, his money. It is the property of the United States, and within the meaning of the bond it is public money.

The answer made to this by counsel is that the debt was not *due*, or, at least, not *payable*, until the assessor had received and acted on the return made by the corporation. There is nothing in the statute which says this in terms. If it be sound it must be an implication, and we do not see how such an implication can arise. That such an assessment was not made long before was owing to the neglect of the company to make proper returns. Did that neglect make the taxes which should have been paid a year before any less a debt from that time? And can it be said they were not due at the time the statute says they should be paid, because the company failed to make the report which it was its duty to make?

If there could be any doubt upon this point, it was set at rest by the decision of this court in *The Dollar Savings Bank* v. *United States* (19 Wall. 227), where the same objection was taken to a suit to recover the tax. The court held explicitly that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it though no officer had made an assessment. So that, both on principle and authority, we are of opinion that the judgment for the sum received by the collector and not paid over, with interest, is right, and must be affirmed. See also *United States* v. *Ferary*, 93 U. S. 625.

Sect. 825, Revised Statutes, enacts that "there shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

The court in this case, after a motion for re-taxation, ordered that this two per cent on the sum recovered, amounting to $712.77, be taxed against defendants. In this we think there was error.

1. The section applies only to cases where the money is collected or realized. This cannot be told until it is done, and the sum cannot, therefore, be taxed in the judgment against defendant. Suppose in the present case half the judgment is realized and no more, then the sum taxed is twice as much as the law allows.

2. This two per cent is to be in lieu of all costs and fees in such proceeding. If it be costs taxable against defendants, then where, after a long litigation, the defendant is adjudged to pay ten dollars and costs, he escapes by paying ten dollars and twenty cents in full. This is obviously not the purpose of the statute, but must be its results if the word "taxed" in the section means taxed in court against the defendant.

The section was no doubt intended to establish a rule of compensation as between the government and its attorney, by which, when he has been successful, he gets a commission of two per cent for collection, but leaves him his ordinary statutory fee where nothing is realized.

So much of the judgment, therefore, as relates to this sum taxed in the costs will be reversed, and the remainder of the judgment affirmed; and it is

So ordered.

MR. CHIEF JUSTICE WAITE did not sit in the case, nor take any part in deciding it.

FOSDICK v. SCHALL.

On Feb. 1, 1873, a railroad company in Illinois entered into a contract with A., whereby he agreed to sell and deliver to it, at a price payable in instalments, a number of cars, which, until they should be paid for, were to remain his property. They, when delivered, were numbered, marked, and lettered as his property, and were thereafter used in the ordinary business of the company. Prior to said contract the company had mortgaged to B., as trustee, its franchises, issues, and profits, and all the property it then possessed or might thereafter acquire, either in law or in equity, to secure the payment of certain bonds. B. filed, May 20, 1875, his bill for foreclosure. The receiver appointed by the court to take charge of the road, finding that the cars had not been paid for, and that they were necessary for its use, entered into an arrangement with A., subject to the approval of the court, by which they were valued at $420 each; and it was agreed that a monthly rent of $7 should be paid for each, with interest on the deferred payments, until the amount so paid should equal the value of the cars. They were then to become the property of the company. A., in January, 1876, intervened in the foreclosure suit, and after averring the payment of the rent during the period the receiver had used the cars, prayed that, out of any funds standing to the credit of the cause not otherwise appropriated, he should be paid for the use of the cars from October, 1874, when the last instalment of the purchase-money therefor had been paid, and that the cars be returned to him. B. and certain intervening bondholders, claiming that the cars, the title thereto having passed to the company under the contract, were, as after-acquired property, subject to the lien of the mortgage, denied that A. was entitled to payment for said use from the income of the road or from the proceeds of the sale, or to a return of the cars. The court, Dec. 6, 1876, ordered the sale of the mortgaged property, not including the cars. It was thereupon sold, the sale confirmed, and a conveyance to the purchasers ordered. Subsequently the court decreed that as A. had not parted with his title, the cars should be returned to him, and that the clerk should, out of the funds standing to the credit of the cause, pay to him $14,568.75 as rent for the period the cars were in use before the appointment of the receiver. It does not appear that there were any funds in court to the credit of the cause except such as arose from the sale. *Held*, 1. That the lien of the mortgage did not attach to the cars upon their delivery to the company so as to defeat A.'s reclamation of them as against the mortgagee. 2. That the payment out of the earnings of the road for rent of the cars for the time they were used by the receiver was proper. 3. That *prima facie* the fund to the credit of the cause belonged to the mortgage creditors, and that A., being only a general creditor, is not entitled to payment therefrom.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The Chicago, Danville, and Vincennes Railroad Company, an Illinois corporation, on the 10th of March, 1869, executed a mortgage to William R. Fosdick and James D. Fish, trustees,

to secure an issue of $2,500,000 of bonds. This mortgage covered all the franchises, issues, and profits of the company, and all the property it then owned or possessed, or might thereafter acquire, either in law or equity. Provision was made to the effect that, in case of default in the payment of interest on the bonds continuing for six months, the trustees in the mortgage, on demand of the holders of at least one-half the bonds then outstanding and unpaid, might take possession of all the mortgaged property, together with all the books, records, papers, accounts, and money of the company, and enter into the management and control thereof, paying all the expenses of taking, holding, managing, and operating the property from the income and profits thereof, or, if the property should be sold, from the sale thereof. The property might be sold as an entirety, and the proceeds, after deducting the expenses of sale, applied to the payment of the interest and principal of the bonds.

On the 12th of March, 1872, a second mortgage was executed to the same trustees, to secure a further issue of bonds to the amount of $1,500,000.

On the 1st of February, 1873, after both these mortgages were executed, the railroad company and Michael Schall entered into a contract in writing, a copy of which is as follows: —

"NEW YORK, Feb 1, 1873.

"Sold this day for account of Mr. Michael Schall, of York, Penn.,
"To the Chicago, Danville, and Vincennes Railroad Co.
"Office 38 Pine Street, New York:

"Two hundred (200) eight-wheel gondola coal-cars, as per specifications and agreement made by J. E. Young, and herewith attached.

"Price, delivered on the track at Pittsburg, at depot of P. C. & St. L. R. R., seven hundred dollars per car. Cars to remain the property of Michael Schall until paid for.

"Delivery to commence, and cars to be taken, on or before March 1, and at least twenty-five (25) cars in each week thereafter until all are delivered, the seller having the option of increasing the number of cars to be delivered per week, if desired.

"Settlement to be made on delivery of each twenty-five (25) cars or more, at the option of sellers, with the notes of the Chicago, Danville, and Vincennes Railroad Company, payable in the city of

New York, and adding interest at the rate of ten per cent per annum. The first notes are to be drawn at sixty days from date of delivery, and for twenty (20) dollars on each car, and the balance for a like amount and payable monthly thereafter.

"Cars to be lettered and numbered as per directions of Mr Young.

"Invoice and shipping receipts to be sent to the railroad company's office, No 38 Pine Street, New York.

"It is understood the sellers shall not be responsible for the acts of Providence, strikes of workmen, or other causes beyond their control, which may retard and delay the manufacturing and delivery of the said cars as above stated.

"Shipping receipts to be evidence of delivery.

"(Signed) MICHAEL SCHALL.

"I hereby accept the above proposition for the R. R. Co.

"(Signed) J. E. YOUNG, *Gen. Manager.*"

Under this contract two hundred and twenty-five cars were delivered into the possession of the railroad company by Schall, numbered from 0141 to 0365, both inclusive, and lettered, "This car is the property of Michael Schall, York, Pa." Notes were executed by the company, according to agreement, for the price of the cars as they were delivered. Of these notes $44,323.43 have been paid by the company, and $110,334.04 are outstanding. The cars were used by the company in the usual course of business.

On the 22d of February, 1875, Stephen Osgood, who held $9,000 of the bonds secured by the mortgage of 1869, and $2,000 of those secured by that of 1872, filed a bill in chancery in the Circuit Court of Will County, Illinois, against the railroad company and Fosdick and Fish, trustees, with others, for a foreclosure of the two mortgages and a sale of the mortgaged property for the benefit of the bondholders, according to their respective priorities; and on the same day the court appointed Henry B. Hammond and John B. Brown receivers in the cause, with authority to take the moneys, property, and effects of the company into their possession, and run and operate the railroad under the orders of the court until discharged. In the order making the appointment it was specially provided that out of the moneys which should come into the hands of the receivers by reason of the operation of the road, the collection of debts,

or the sale of the property, they should pay without further order as to particular demands —

1. The necessary current expenses of carrying out the duties of the trust;

2. "All debts now [then] due and owing by said railroad company for labor and services rendered in operating the railroad within the [then] last three months, and all indebtedness for engines, iron, wood, supplies, cars, or other property purchased within said period of three months for the use of the company;"

3. Taxes, insurance, and charges of litigation; and,

4. Liabilities for animals killed by engines or cars upon the line of the road.

On the 5th of May, 1875, the cause was removed to the Circuit Court of the United States for the Northern District of Illinois on the application of Fosdick and Fish, trustees, two of the defendants, and on the 17th of the same month the receivers appointed by the State court filed in the Circuit Court an account of their receivership for the months of February, March, and April.

On the 20th of May, Fosdick and Fish, as trustees, filed in the same Circuit Court of the United States their bill against the railroad company and certain other defendants, for the foreclosure of the two mortgages of which they were trustees; and on the same day an order was entered in that court appointing Adna Anderson receiver, with authority to take possession of all the books, papers, vouchers, and evidence of indebtedness, moneys, and assets of the company, and all other effects of every kind, name, and nature which belonged to the company, or were held for its use and benefit, or in which it had any beneficial interest. He was also authorized to run, operate, and manage the road and pay the expenses thereof, and manage and control all the property and affairs of the company. Authority was also given him to use the moneys of the company for any and all the purposes specified in the order, and he was required, as speedily as possible, to examine into the condition of the property and assets of the company, its contracts, leases, running arrangements, its business affairs, and take an inventory of its movable property and make a schedule of its floating

indebtedness for labor and supplies, and report the same, as soon as might be, with his recommendation as to the proper disposition of the same and payment thereof. Under this order Anderson took possession of the property, and on the 11th of June the receivers appointed by the State court filed their final accounts, and asked to be discharged from their trust.

The cars delivered under the Schall contract were in use by the company when the receivers appointed by the State court took possession. Those receivers also continued to use the cars during all the time they operated the road, and Anderson took the possession of them when he entered upon his receivership. On the 27th of November, 1875, Anderson having ascertained what the claim of Schall was, and finding that they were necessary for the use of the road, entered into an arrangement with him, subject to the approval of the court, by which they were valued at $420 each; and it was agreed that Schall should be paid seven dollars a month for each car as rent. The aggregate of payments at this rate for five years would equal the value of the cars; and it was further agreed that if the rent was paid promptly, and in addition an amount which would be equal to interest at the rate of seven per cent per annum on the deferred instalments, the cars should, at the end of that time, become the property of the company.

On the 19th of July, 1875, the Circuit Court denied a motion of Osgood to consolidate his suit removed from the State court with that of Fosdick and Fish, but made an order allowing him and his associates to intervene in the latter suit for the protection of their respective interests, upon taking the necessary steps therefor. Accordingly, on the 6th of January, 1876, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, owners and holders of a large amount of bonds secured by the several mortgages which were in the process of foreclosure, filed, with the permission of the court, their petition of intervention.

On the 27th of January, 1876, Schall filed an intervening petition, in which, after setting forth the facts of his claim substantially as they have already been given, and averring that he had been paid at the rate of seven dollars a month as rent

during all the time the cars had been in use by the present receiver, he asked that the balance, his due, might be paid him out of any funds to the credit of the cause not otherwise appropriated, and that the cars might be returned to him.

Fosdick and Fish and the intervening bondholders answered this petition, claiming that the title of the cars had passed to the company under its contract with Schall, and that consequently the lien of the mortgages had attached to the cars as after-acquired property. They denied his right to payment for the cars out of the income of the road or out of the proceeds of the sale, and they denied his right to a return of the cars.

On the 5th of December, 1876, the court entered a decree in the suit of Fosdick and Fish for a sale of the mortgaged property, not, however, including the cars of Schall; and on the 7th of February, 1877, the property was sold in accordance with the provisions of the decree to Huidekoper, Shannon, and Dennison for $1,450,000. On the 12th of April the sale was approved by the court, and the master ordered to convey the property to the purchasers.

On the 28th of April, 1877, the master, to whom the matter of the intervening petition of Schall had been referred, reported the facts as they have already been stated, and also that the cars were necessary for the use of the road, and that the arrangement which had been made by the receiver was a beneficial one, whether the road remained in the hands of the receiver or passed into the possession of other parties.

To this report Fosdick and Fish and the intervening bondholders excepted, in substance, because the master found the title to the cars to be in Schall, and not in the company. Upon the final hearing, the court held that Schall had not parted with his title to the cars, and was entitled to the possession. Accordingly it was ordered that the receiver, if in possession, or the purchasers at the sale, should restore the cars to Schall, and that the clerk of the court, out of the funds standing to the credit of the cause, should pay him the sum of $9,450, as rent for the cars, at the rate of seven dollars each per month for the six months preceding the 22d of February, 1875, the date when the receivers of the State court were appointed and took possession, and the further sum of $5,118.75, for a like rent dur-

ing the time the cars were used by the receivers of the State court. It nowhere appears from the record that there are any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property.

From this decree Fosdick and Fish and the intervening bondholders have appealed.

Mr. Henry Crawford and *Mr. Ashbel Green* for the appellant.

Even should it finally be decided that the title to the cars has always been in Schall, the court below could not appropriate any part of the proceeds of sale to discharge a liability for the rent of the cars incurred by the mortgagor, years after the lien of the mortgage had become fixed and paramount.

The lien of the appellants by the recorded mortgage became effective March 10, 1869, and a subsequent creditor of the company, who claims under a contract into which he entered without privity of the mortgagee, must hold his rights subject in all things to that mortgage. *Rogers* v. *Humphreys*, 4 Ad. & El. 299; *Haven* v. *Adams*, 4 Allen (Mass.), 80; *Crosby* v. *Harlow*, 21 Me. 499; *Ellis* v. *B. H. & E. Railroad*, 107 Mass. 1. The Statute of Illinois is express. Gross, Stat., c. 24, sect. 19. The judicial construction of it has with unvarying strictness charged him with full notice of the rights of the holders of the first recorded lien, and ruled that it was impossible for him to acquire any greater interest or equities in the incumbered estate than the mortgagor possessed. *Warner* v. *Helen*, 1 Gilm. (Ill.) 220; *Kruse* v. *Scripps*, 11 Ill. 98.

The lien given to a mechanic by express enactment is treated as an *in invitum* hypothecation of the premises on which the work is done or materials are delivered; and if it be subsequent in date to duly recorded incumbrances, he accepts it with full notice. He cannot recoup the improvements incorporated in the mortgaged premises, nor postpone the claim of the mortgagees.

The action of the court below in repudiating this doctrine is contrary to all the authorities. *Reed* v. *Bank of Tennessee*, 1 Sneed (Tenn.), 262; *Jesup* v. *Stone*, 18 Wis. 466; *Otley* v. *Haviland*, 36 Miss. 19; *Prior* v. *Munn*, 4 Cal. 175; *Hughes* v. *Edwards*, 9 Wheat. 500; *Minnesota Company* v. *St. Paul*

Company, 2 Wall. 609; *Butt* v. *Ellett*, 19 id. 544; *Getchell* v. *Allen*, 34 Iowa, 562.

The governing principles upon which priority of lien is based are that the vested rights of purchasers or incumbrancers cannot in any manner or to any degree be impaired or displaced, when once attached, by any rights subsequently accruing to mechanics. *Williams* v. *Chapman*, 17 Ill. 423; *McLagan* v. *Brown*, 11 id. 519.

In an ordinary foreclosure, it would be conceded that these principles control, and that the statutory priority of the bondholders cannot be defeated by devoting any part of the proceeds of the sale to the payment of any junior liability or contract of the mortgagor.

The only claim to exempt this case from the control of the rules applicable to real-estate mortgages must be based upon the exploded hypothesis that mortgages upon railways are in this respect exceptional in their character. The legislature gave this corporation power to "mortgage" its property to secure its bonds. The mortgage, as to its execution, acknowledgment, record, and effect, was determined by those laws and statutes applicable to mortgages made by natural persons. On default, it is enforceable by chancery, and the rights of the creditors secured thereby are protected by the same principles as to registry and priority which preserve the vested rights of other mortgagees. The attempt to make a distinction to the prejudice of the mortgagees of a railroad was repudiated by this court at a very early period in the history of this class of securities. *Dunham* v. *Railway Company*, 1 Wall. 268. See also *Palmer* v. *Forbes*, 23 Ill. 248.

The bondholders' right grows out of their lien upon the entire railroad and appurtenances whose sale produced the fund. According to fundamental principles, Schall's claim, arising years later, is subordinate, and therefore not entitled to any share of the fund until full payment of the bonds.

No warrant can be found in the legislation of Illinois for a preference to the car manufacturer. A railroad being a *quasi* public work, owned and operated by an artificial person, having only such capacity as the legislature chooses to grant, it is usual, by express statute, to vest borrowing powers and the

authority to create even an express contract lien. In the absence of positive enactment, a railroad company cannot create a statutory charge upon its road by incurring a liability for improvements. *Dunn* v. *North Missouri Railroad*, 24 Mo. 493; *McAuley* v. *West Vermont Railroad*, 33 Vt. 323. The only statute of Illinois purporting to cover this class of liabilities and authorize a lien upon railroads is that of July 1, 1872 (Rev. Stat. Ill. (1874), p. 671, sect. 51), which embraces, *inter alia*, fuel, ties, material, supplies, or any other article or thing necessary for the operation of the road. We do not ask any narrow construction of the statute as to the class of claims included in it. Cars are necessary for the operation of a railroad; should an owner of them, by a contract for rent, lease his equipment to an Illinois railroad corporation, he might, under a fair construction of the law, be considered as furnishing a supply or an article or a thing necessary for the operation of the road, and as entitled to the precise rights and remedies of the statute.

The nature and extent of this statutory right, and especially when invoked as against prior and fixed incumbrances, are not matters of doubtful construction.

In determining whether such a construction is to be put upon the statutes as would overreach prior incumbrances, very strict canons of construction are adopted by the courts. *Morgan* v. *Cincinnati*, 3 Wall. 275; *Davis* v. *Alvord*, 94 U. S. 545; *Cook* v. *Heald*, 21 Ill. 425; *Brady* v. *Anderson*, 24 id. 112; *Stephens* v. *Holmes*, 64 id. 336.

This construction given to the local statute by the highest judicial authority of the State is controlling on the Federal courts. *Leffingwell* v. *Warren*, 2 Black, 599; *Nichols* v. *Levy*, 5 Wall. 433; *Railroad Tax Cases*, 92 U. S. 575.

The statute, instead of displacing prior liens to any extent whatever, has been cautiously framed to protect them, in precise harmony with the correct principles which we have noted, and most explicitly defines and bounds the lien. It is "upon all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles," &c. Prior mortgages or other liens

are left wholly untouched. Their priorities, already assured by the registry laws, were further designed to be protected by express legislation, and as against them the material-man has no lien. His only claim is to take his incumbrance as of the date when his supplies were first delivered; and, if any surplus is left after full payment of the precedent mortgages, to assert it upon that, as against the liens which accrued after his had become vested.

Davis v. *Bilsland* (18 Wall. 659) and *Fox* v. *Seal* (22 id. 424) were decided upon statutes whose provisions are directly the reverse of those which apply to this case.

The first mortgage which the Circuit Court displaced by this decree did not accrue after, but five years before, the sale of the cars or their delivery to the company, and Schall's statutory charge was wholly inoperative. If he had, in apt time, instituted an equitable action in his own name, to enforce his lien on the railroad property by reason of his claim, he could only have obtained a decree limited to the company's title, and to that of such mortgagees as had accrued after the date when the delivery of his cars began. His rights cannot be amplified because he seeks to enforce them as an intervener in a pending foreclosure case. The statute only fixes the lien "provided suit shall be commenced within six months after such material shall have been furnished." When Schall filed his petition the bar of the statute was complete. *Green* v. *Jackson Water Co.*, 10 Cal. 374; *Green* v. *Ely*, 2 Greene (Iowa), 508; *Lunt* v. *Stephens*, 75 Ill. 512; *Arbuckle* v. *Illinois Midland Railway*, 81 id. 431; *Pryor* v. *White*, 16 B. Mon. (Ky.) 605; Phillips, Mech. Liens, sect. 281.

The mechanic's lien derives its existence and efficacy from positive legislation, and not by reason of any superior natural equity. It can never be enforced, unless he brings himself within the provisions of the statute.

The whole doctrine was summed up in *Ellison* v. *Jackson Water Co.*, 12 Cal. 554. "The plaintiff cannot, therefore, maintain the lien he asserts under the statute, and outside of the statute there is no lien which can be enforced. Equity raises no lien in relation to real estate except that of a vendor for purchase-money." See also *Spencer* v. *Barnett*, 85 N. Y.

94; *McNeil* v. *Borland*, 23 Cal. 144; *McCoy* v. *Quick*, 30 Wis. 521; *Clark* v. *Moore*, 64 Ill. 275; *Croskey* v. *N. W. M. Co.*, 48 id. 480; *Brady* v. *Anderson*, 24 id. 112; *Stephens* v. *Holmes*, 64 id. 336; *Rothgerber* v. *Dupy*, id. 452; *Phillips* v. *Stone*, 25 id. 80; *Cook* v. *Heald*, 21 id. 425; *Canal Company* v. *Gordon*, 6 Wall. 561; *Fountain* v. *Reneval*, 17 How. 384.

The charter of the company authorized it to mortgage all its then existing or after-acquired property. The lien was thus to be paramount, continuous, and effectual. The power of sale in that instrument was a part of the security which mortgage creditors had the right to have enforced. *Shaw et al.* v. *Norfolk County Railroad Co. et al.*, 5 Gray (Mass.), 162; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798; *Dows* v. *Muller*, id. 444; *Gilman et al.* v. *Illinois & Mississippi Telegraph Co.*, 91 id. 603.

The appointment of a receiver in such cases is equivalent to an entry by the mortgagees, and thereafter the income of the property is theirs. *American Bridge Co.* v. *Heidelbach*, *supra*; *Gilman* v. *Illinois & Mississippi Telegraph Co.*, *supra*; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 482; *Noyes* v. *Rich*, 52 Me. 116; *Boyd* v. *Burke*, 8 I. R. Eq. 660; *Howell* v. *Ripley*, 10 Paige (N. Y.), Ch. 43; *Ellis* v. *Boston, Hartford, & Erie Railroad Co.*, 107 Mass. 1.

The Circuit Court had no more authority to take a portion of the mortgage security and devote it to subsequent creditors, than to order it paid over to the corporation itself, and then let it pay its own floating debts. *Douglass* v. *Cline*, 8 Cent. Law J. 659.

An exceptional case of hardship or equity does not authorize a court to disregard the legal priority of the mortgages. *Denniston* v. *Chicago, Alton, & St. Louis Railroad Co.*, 4 Biss. 415; *Ellis* v. *Boston, Hartford, & Erie Railroad Co.*, *supra*; *Galveston Railroad Co.* v. *Cowdrey*, *supra*; *Duncan* v. *Mobile & Ohio Railroad*, 2 Woods, 545; *Coe* v. *Columbus, Peoria, & Indiana Railroad Co.*, 10 Ohio St. 404; *Dillon* v. *Barnard*, 1 Holmes, 394; *Dunham* v. *Railway Company*, 1 Wall. 268; *Nelson* v. *Iowa Eastern Railway Co.*, 2 Cent. Law J. 741.

Schall cannot lawfully recover possession of the cars, nor compensation for their use by a receiver, in the foreclosure

suit, because the trust-deed became a subsisting and paramount lien thereon, as soon as they were purchased by and delivered to the company, and the written contract under which Schall claims title is, as against the appellants, void under the laws of Illinois. *Pennock* v. *Coe*, 23 How. 117; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609; *Shaw* v. *Bill*, 95 U. S. 10; *Galveston Railroad* v. *Cowdrey*, *supra*.

The Supreme Court of Illinois, in *Palmer* v. *Forbes* (23 Ill. 248), announced the same view, holding that engines and cars were in the nature of chattels real, and, whenever they came into the possession of the company by purchase, became immediately subject to the mortgage.

This construction of the mortgage was, therefore, at its date, a fixed rule of property.

The bondholders' title to the cars is based on the fact that they are described in the mortgage, and that their lien has been still further ripened and enforced by an actual possession taken in their interest.

Schall sold the cars to the company. The sale was perfected by actual delivery, and part payment was made. The title was attempted to be retained in him, but solely by way of security for the unpaid portion of the contract price. He had no right of possession, use, or disposition of them, and the risk of the property was with the company.

The exact legal character of the contract is thus defined by the Supreme Court of Illinois: "It was a conditional sale with a right of rescission on the part of the vendor in case the purchaser should fail in payment of his instalments. A contract legal and valid as between the parties, but made with the risk on the part of the vendor of losing his lien in case the property should be levied upon by creditors of the purchaser while in possession of the latter." *Murch* v. *Wright*, 46 Ill. 488.

The transaction is precisely as though the petitioner had executed a formal bill of sale for the cars, and taken back an unrecorded chattel mortgage for the deferred payments.

The invalidity of such an unrecorded and unacknowledged contract for a lien is settled by the Supreme Court of Illinois interpreting the statute. *Ketchum* v. *Watson*, 24 Ill. 591;

Forest v. *Tinkham*, 29 id. 141; *McCormick* v. *Hadden*, 37 id. 871; *Sage* v. *Browning*, 51 id. 217; *Frank* v. *Miner*, 50 id. 444.

The whole subject has been recently adjudged by this court in *Hervey et al.* v. *Rhode Island Locomotive Works*, 93 U. S 664.

Mr. R. Biddle Roberts, contra.

The cars furnished by Schall being in the nature of supplies, within the meaning of the Illinois statute of July 1, 1872, entitled him to a lien upon all the personal property of the company for the amount due him. That lien was not lost by the delay in filing his petition. The possession of the receiver was for the benefit of all parties who might at the termination of the suit be found to be entitled to the property, and it prevented the lapsing of the lien by limitation. *Wrixon* v. *Vize*, 3 Dr. & War. 104.

A contract of conditional sale of cars to a railway company — by the terms of which the company takes possession, and the vendor retains the title to and the ownership of them until full payment for them is made — is, even in Illinois, a valid contract, without recording it as a chattel mortgage, and is binding upon the company and its receiver. Under it, as between the company and its privies and the vendor, the title to the cars does not pass to or vest in the company until full payment is made. 1 Parsons, Contr., p. 449; Benjamin, Sales, sect. 320; Story, Sales, sect. 313; Hilliard, Sales, p. 61; 2 Kent, Com., p. 497; 2 Schouler, Pers. Prop., p. 292; *Murch* v. *Wright*, 46 Ill. 487; *Gibbs* v. *Jones*, id. 319; *Fawcett, Isham, & Co.* v. *Osborn, Adams, & Co.*, 32 id. 411.

That such a contract is valid and binding against everybody, and under it the vendor holds his title absolutely against not only the vendee and his privies, attaching creditors of the vendee, and sales on execution levied by them, but even against *bona fide* purchasers without notice, is sustained by the weight of authority. *Copland* v. *Bosquet*, 4 Wash. 588; *Rogers Locomotive Works* v. *Lewis*, 4 Dill. 158; *Tibbetts* v. *Towle*, 12 Me. 341; *Hotchkiss* v. *Hunt*, 49 id. 213; *Edwards* v. *Grand Trunk Railway of Canada*, 54 id. 105; *Crocker* v. *Gullifer*, 44 id. 491; *Luey* v. *Bundy*, 9 N. H. 298; *Porter* v. *Pettengill*, 12 id. 299;

Kimball v. *Jackman*, 42 id. 242; *McFarland* v. *Farmer*, id. 286; *West* v. *Bolton*, 4 Vt. 558; *Manwell* v. *Briggs*, 17 id. 176; *Bradley* v. *Arnold*, 16 id. 382; *Root* v. *Lord*, 23 id. 568; *Davis* v. *Bradley*, 24 id. 55; *Clark* v. *Wells*, 45 id. 4; *Armington* v. *Houston*, 38 id. 448; *Coggill* v. *Hartford & New Haven Railroad Co.*, 3 Gray (Mass.), 545; *Sargent* v. *Metcalf*, 5 id. 306; *Burbank* v. *Crooker*, 7 id. 158; *Deshon* v. *Bigelow*, 8 id. 159; *Hirschorn* v. *Canney*, 98 Mass. 149; *Day* v. *Bassett*, 102 id. 445; *Crompton* v. *Pratt*, 105 id. 255; *Barrett* v. *Pritchard*, 2 Pick. (Mass.) 512; *Hussey* v. *Thornton*, 4 Mass. 405; *Marston* v. *Baldwin*, 17 id. 606; *Ballard* v. *Burgett*, 40 N. Y. 314; *Keeler* v. *Field*, 1 Paige (N. Y.), 312; *Herring* v. *Hoppock*, 15 N. Y. 409; *Forbes* v. *Marsh*, 15 Conn. 384; *Hart* v. *Carpenter*, 24 id. 427; *Rose* v. *Story*, 1 Pa. St. 190; *Agnew* v. *Johnson*, 22 id. 471; *Lehigh Company* v. *Field*, 8 Watts & S. (Pa.) 232; *Sage* v. *Sleuts*, 23 Ohio St. 1; *Roland* v. *Gundy*, 5 Ohio, 202; *Carmack* v. *Gordon*, 2 Cin. (Ohio) 408; *Thomas* v. *Winters*, 12 Ind. 322, *Shireman* v. *Jackson*, 14 id. 459; *Plummer* v. *Shirley*, 16 id. 380; *Hanway* v. *Wallace*, 18 id. 377; *Dunbar* v. *Rawles*, 28 id. 225; *Bradshaw* v. *Warner et al.*, 54 id. 58; *Parmlee* v. *Catherwood*, 36 Mo. 479; *Griffin* v. *Pugh*, 44 id. 326; *Little* v. *Page*, id. 412; *Ridgeway et al.* v. *Kennedy et al.*, 52 id. 24; *Bailey* v. *Harris*, 8 Iowa, 331; *Robinson* v. *Chapline*, 9 id. 91; *Baker* v. *Hall*, 15 id. 277; *Owens* v. *Hastings & Sexton*, 18 Kan. 446; *Sumner* v. *McFarland*, 15 id. 600; *Hallowell* v. *Milne*, 16 id. 65; *Couse* v. *Tregent*, 11 Mich. 65; *Fifield* v. *Elmer*, 25 id. 48; *Hunter* v. *Warner*, 1 Wis. 126; *Goldsmith* v. *Bryant*, 26 id. 34; *Bradshaw* v. *Thomas*, 7 Yerg. (Tenn.) 497; *Gambling* v. *Read*, 1 Meigs (Tenn.), 281; *Buson* v. *Dougherty*, 11 Humph. (Tenn.) 50; *Ellison* v. *Jones*, 4 Ired. (N. C.) 48; *Parris* v. *Roberts*, 12 id. 268; *Patton* v. *McCane*, 15 B. Mon. (Ky.) 555; *Chism* v. *Woods*, Hard. (Ky.) 531; *Goodwin* v. *May*, 23 Ga. 205; *McBride* v. *Whitehead*, 1 Ga. Dec. 165; *Thompson* v. *Ray*, 46 Ala. 224; *Mount* v. *Harris*, 1 Smed. & M. (Miss.) Ch. 185; *Williams* v. *Connoway*, 3 Houst. (Del.) 63.

The possession of a railroad and its equipments, which is taken by a receiver under an appointment by a court, changes no right of ownership of any part of the property, perfects no title to any part, gives no new or added right to any part,

changes no contract regarding the ownership of any part; but is merely a holding by the same title, subject to the same contracts, limitations, and conditions under which the railroad company held the property, at the time of such appointment. Edwards, Receivers, pp. 3, 4, 12, 165; 2 Dan. Ch., 28, sect. 8; Field, Corp., sects. 419, 420; High, Receivers, sects. 5, 318, 319; *Hide* v. *Lynde*, 4 Comst. (N. Y.) 387; *Curtis* v. *Leavitt*, 15 N. Y. 1; *Skip* v. *Harwood*, 3 Atk. 564; *Portman* v. *Mill*, 8 Law J. N. S. 165; *Delany* v. *Mansfield*, 1 Hog. 235; *Receivers* v. *The Paterson Gas Light Co.*, 3 Zab. (N. J.) 283; *In re Colvin*, 3 Md. Ch. 280; *Williamson* v. *Wilson*, 1 Bland (Md.), 418; *H. K. Chase's Case*, id. 206; *Ellicott* v. *Warford*, 4 Md. 80; *Ellis* v. *Boston & Hartford Railroad Co.*, 107 Mass. 1; *Lincoln* v. *Fitch*, 42 Me. 469; *Devendorf* v. *Beardsley*, 23 Barb. (N. Y.) 656; *Williams* v. *Babcock*, 25 id. 109.

The company not having acquired the title to the cars, they never became subject to the lien of the mortgage, and cannot be held by the receiver or the mortgagees, except upon complying with the conditions of the contract of sale. If he uses the cars in operating the railroad, and does not comply with that contract by paying for them, the owner has a just claim for the use of them, which should be paid out of the earnings of the trust property while in the hands of the receiver, or out of the proceeds of the sale of it, if the earnings have been applied to the benefit of it. *United States* v. *New Orleans Railroad*, 12 Wall. 362; *State of Florida* v. *Anderson et al.*, 91 U. S. 667; *Williamson* v. *New Jersey Southern Railway Co.*, 28 N. J. Eq. 277; *Ellis* v. *Boston, Hartford, & Erie Railroad Co.*, 107 Mass. 1.

The railroad company never having acquired the title to the cars, the decree below ordering their delivery to the appellee, and the payment to him of the $14,568.75 as rent, was proper, and should be affirmed.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

Two questions are presented by the assignment of errors in this case: —

1. Did the lien of the mortgages attach to the cars of Schall

on their delivery to the company under his contract, so as to prevent their reclamation as against the mortgagees if the price was not paid according to agreement?

2. Was the order for the payment out of the fund in court of the rent of the cars, during the time they were used by the receivers appointed by the State court and for six months before, justifiable under the circumstances of this case?

As to the first question, it is contended that the mortgage created a subsisting and paramount lien on the cars as soon as they were put into the possession of the railroad company under the contract, and that the reservation of the title was void under the laws of Illinois, because the contract was not recorded.

It must be conceded that contracts like this are held by the courts of Illinois to be in effect, so far as the chattel mortgage act of that State is concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the price. We had occasion to consider that question in *Hervey et al.* v. *Rhode Island Locomotive Works* (93 U. S. 664), and there held, following the Illinois decisions, that if such an instrument was not recorded in accordance with the provisions of the chattel mortgage act (R. S. Ill., 1874, 711, 712), a lien like that of Schall would have no validity as against third persons. Whatever may be the rule in other States, this is undoubtedly the effect of the Illinois statute as construed by the courts of that State. In *Green* v. *Van Buskirk* (5 Wall. 307), this court also held that "where personal property is seized and sold under an attachment, or other writ issuing from a court of the State where the property is, the question of the liability of the property to be sold under the writ must be determined by the law of that State, notwithstanding the domicile of all the claimants to the property may be in another State." *Hervey* v. *Rhode Island Locomotive Works* (*supra*), was also a case of seizure and sale under judicial process; and the language of the court, as expressed in its opinion delivered by Mr. Justice Davis, is to be construed in connection with that fact.

As between the parties, notwithstanding the Illinois statute, the transaction is just what, on its face, it purports to be, "a conditional sale, with a right of rescission on the part of the

vendor, in case the purchaser shall fail in payment of his instalments, — a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien" if it works a legal wrong to third parties. *Murch* v. *Wright*, 46 Ill. 488. The question, then, is whether these mortgagees occupy the position of third parties within the meaning of that term as used in this statute.

They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are "after-acquired" property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were "loose property susceptible of separate ownership and separate liens," and "such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto." *United States* v. *New Orleans Railroad*, 12 Wall. 362. The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract.

The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.

It follows that the decree ordering a return of the cars to Schall was right. Whether, if the property is worth more than is due upon the contract of purchase, the mortgagees can obtain the benefit of the overplus, is a question we are not called upon to consider.

As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the

receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings

to the current debt shall be paid by the court from the future current receipts before any thing derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Gilman et al.* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *American Bridge Co.* v. *Heidelbach*, 94 id. 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon

an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper ap-

plication of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervener has brought himself within the rule fixed by the State court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the State court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.

The decree of the Circuit Court will be reversed so far as it directs the payment of the sum of $14,568.75 to Schall, the appellee, from the fund in court; but in all other respects it

is affirmed, and the cause remanded with instructions to so modify the decree as to make it conform hereto. The costs of the appeal must be paid by the appellee; and it is

So ordered.

FOSDICK v. CAR COMPANY.

The ruling in *Fosdick* v. *Schall* (*supra*, p. 235), that where a contract between A and a railroad company for furnishing it cars provides that they shall be his property until paid for, a pre-existing mortgage by the company of all its then property, or that which it might thereafter acquire, does not subordinate the claim of A. for the price of the cars to the lien of the mortgagees, reaffirmed and applied to this case.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Henry Crawford and *Mr. Ashbel Green* for the appellants.

Mr. R. Biddle Roberts, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This appeal presents another petition of intervention filed in the suit of *Fosdick & Fish* v. *The Chicago, Danville, & Vincennes Railroad Company.* The general facts appearing in that suit are stated in the case of *Fosdick* v. *Schall*, *supra*, p. 235.

The claim of this intervener, the Southwestern Car Company, like that of Schall, arises out of a contract for the sale of cars, made with the railroad company on the 10th of January, 1875, a few days before the appointment of the receivers in the State court. The price was secured by the notes of the company on long time, but the title of the cars was to remain in the vendor until the notes were paid. The cars all had upon them marks indicating the ownership of the intervener.

The petition of intervention was filed Jan. 27, 1876. It set out the particulars of the contract, and asked that the receiver might be authorized to pay the price and keep the cars, as they

were necessary for the profitable equipment of the road. Fosdick and Fish and the intervening bondholders answered, and without denying the material averments in the petition, claimed that notwithstanding the conditions of the sale the lien of the mortgages was paramount to the title of the intervener. The petition was referred to a master to take testimony and report; but before any report was brought to the attention of the court, if indeed any had been filed, a decree of sale was entered in the principal cause in such form as to direct a sale of the cars in question as part of the railroad. After the sale had been made and confirmed, a report under the order of reference in the petition of intervention was filed. This report was to the effect that the title of the cars had never passed out of the vendor; that the price agreed to be paid, $12,750, was reasonable; that no part of it had been paid; that the cars had been in use on the road since January, 1875, for which no compensation had been made; and that these cars or similar ones were needed for the business of the railroad.

Fosdick and Fish and the intervening bondholders excepted, on the ground that the lien of the mortgages was paramount to the title of the intervener. Upon the hearing the exceptions were overruled; and as the cars had been included in the foreclosure sale, the clerk was directed to pay the purchase price to the intervener from the fund in court. From this decree the present appeal has been taken.

According to the decision in *Fosdick* v. *Schall*, the lien of the mortgages upon the cars now in question was subject to the paramount claim of the car company for the price. The intervening petition on file when the foreclosure sale was made was notice to the purchasers that the rights they acquired under the sale would be subject to the claim of the car company, as finally determined in the further progress of the cause. A restoration of the cars might, therefore, have been decreed to the intervener notwithstanding the sale. Instead of that, the payment of the price from the fund in court has been ordered. We do not understand that objection is made to this if the claim of the intervener is superior to that of the mortgages, as we hold it to be.

Decree affirmed.

HUIDEKOPER v. LOCOMOTIVE WORKS.

The ruling in *Fosdick* v. *Schall* (*supra*, p. 235), that the funds in the hands of a receiver of a railroad appointed in a suit to foreclose a mortgage executed by the company must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors of the company, reaffirmed and applied to this case.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. Henry Crawford and *Mr. Ashbel Green* for the appellants.

Mr. R. Biddle Roberts, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is also an appeal from a decree upon a petition of intervention filed in the case of Fosdick and Fish against the Chicago, Danville, and Vincennes Railroad Company. On the 1st of September, 1873, the Hinckley Locomotive Works entered into a contract with the railroad company for the sale of three locomotive engines, and on the 8th of October, 1873, for the sale of two more. By the terms of these contracts, notes were to be given for the price, payable at stated periods, which might be renewed if required. The title to the locomotives was to remain in the vendors until the notes were paid.

On the 8th of October, 1875, Anderson, the receiver in the cause, filed his petition in court, setting forth the contracts between the railroad company and the locomotive works, with a statement of the notes for the price then outstanding and unpaid; that on account of the peculiar construction of the engines they were not adapted to the business of the road, and could not be economically used, and that the locomotive company claimed title to the engines under their contract. He therefore asked authority from the court to surrender the engines to the locomotive company, and to adjust, settle, and pay for their use during and from the date of the receivership. On the same day the necessary authority for the restoration of the engines was granted, and the receiver was instructed, if

it was done, to receive the outstanding notes given for the price, and deposit them with the clerk, subject to the further order of the court.

On the 25th of October, the locomotive company filed its petition in the cause, setting forth that the engines had been taken back and the notes deposited with the clerk, in accordance with the instructions which had been given the receiver. It then asked that the contracts and notes be referred to a master to ascertain and report the balance due upon them. On the same day the reference was made as asked, and on the 29th of November, 1876, the master reported that the engines were accepted by the railroad company under the contracts, and used continuously until the fall of 1875, when they were returned to the locomotive company in an injured condition; that they had since been sold to other companies at reduced rates, and were worth when surrendered about one-half what they were when put into the possession of the company. He also stated his inability to ascertain definitely the amount to which the locomotive company was entitled, except upon the basis of a suggestion made by the receiver, that a payment should be made by way of compromise of an amount which would be fifty per cent of the original contract price after deducting the amount received from the sale of the engines to other parties. He thereupon recommended the payment of $18,000 as a compromise settlement of the claim.

On the 14th of December, 1876, which was subsequent to the decree of foreclosure, but before the sale, after reading the report of the master, on motion of the solicitor of the locomotive company, and with the consent of Fosdick and Fish and the railroad company, the court found due from the railroad company, "for the use of and repairs to locomotives, the sum of $15,793.75," and ordered the receiver to pay it to the locomotive company out of the moneys in his hands as soon as it could be done consistently with the operation of the road and the payment of claims theretofore ordered. At the time this order was made the intervening bondholders had been admitted as parties to the cause, and it does not appear that their consent was obtained. On the 5th of January, 1877, they filed objections to the allowance of the claim on the ground that it was

in the nature of a mere claim for money due on an account closed before the appointment of a receiver for the railroad company, and that the bondholders had a paramount lien on the earnings of the road and the proceeds of the sale. At the same time they filed a motion to set aside the order made December 14, for the payment of the claim. No payment was made by the receiver under the order, and on the 28th of April, after the sale under the foreclosure and its confirmation, the matter came on again for hearing upon the motion to set aside. This motion was overruled, and a further order made for the payment of the amount which had been found due "out of the proceeds in . . . court." From this last and final decree the intervening bondholders took this appeal.

We think this case is settled by that of *Fosdick* v. *Schall*, *supra*, p. 235. The amount found due the locomotive company is not in reality for the use and repairs of the engines, but on account of what was agreed to be paid for the purchase. The railroad company contracted to buy the engines and pay a certain price. The locomotive company retained a paramount lien to secure the sum to be paid. The debt so incurred was not paid. The lien of the locomotive company has been in effect foreclosed, and a balance of the debt still remains due. Whatever may have been the form of the transaction, this is its substance. So far as we can see, no equitable claim upon any fund in court has been established as security for this debt. The locomotive company occupies the position of a general creditor with no special equities in its favor. As no question is presented for our consideration except that arising upon the payment of the money decree, that decree will be reversed and the cause remanded for such further proceedings, not inconsistent with this opinion, as may seem to be proper; and it is

So ordered.

CAMPBELL v. RANKIN.

1. An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties.
2. In trespass *quare clausum fregit*, actual possession of the land by the plaintiff is sufficient evidence of title to authorize a recovery against a mere trespasser.
3. The judgment of a court of competent jurisdiction is, as to every issue decided in the suit, conclusive upon the parties thereto, and in a subsequent suit between them parol evidence, whenever it becomes necessary in order to show what was tried in the first suit, is admissible.
4. While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession.
5. The fifth section of the act entitled "An Act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 Stat. 91), gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective States, and does not exclude as *prima facie* evidence of title proof of actual possession, and of its extent.

ERROR to the Supreme Court of the Territory of Montana.

The facts are stated in the opinion of the court.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for the plaintiffs in error.

Mr. Richard T. Merrick, *contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The declaration avers that plaintiffs below, who are also plaintiffs in error, were the owners of a mining claim in Meagher County, known as Claim No. 2 below discovery, in Green Horn Gulch, and that defendant wrongfully entered upon and took possession of a portion of said claim, and took and carried away large quantities of gold-bearing earth and gold-dust, the property of plaintiffs, of the value of $15,000.

The answer amounts to a general denial of all the averments of the complaint.

Bills of exception taken on the trial show that plaintiffs offered in evidence the record of a judgment in the same court, in which the defendant in this suit was plaintiff, and the present plaintiffs and those under whom they claim were defendants, which was an action for trespass, wherein the same question o

conflicting interference of the two mining claims was in issue, and the verdict and judgment were for plaintiffs in this suit. The admission of this record was objected to, and the court sustained the objection.

Plaintiffs then offered to prove that they had been in actual possession of Claim No. 2 in Green Horn Gulch for several years, and that defendant had admitted in conversation the existence of such a claim, and had conceded a dividing line between his claim and that of plaintiffs, which would give to the latter the ground in controversy. The court refused this also.

Plaintiffs then offered in evidence a deed from Harding & Wilson for Claim No. 2, Green Horn Gulch, dated December, 1869, and proof of occupancy and use of it ever since. The court rejected this also. And having rejected all the evidence offered by plaintiffs, it directed the jury to find for defendant, and on that verdict rendered a judgment, which was affirmed on appeal by the Supreme Court of the Territory.

The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that the controversy involves only such possessory right as the act of Congress recognizes in the locator and occupant of a mining privilege.

Since this right of possession was the matter to be decided by the jury, it is almost incomprehensible that proof of prior occupancy, and especially when accompanied by a deed showing color of right, should be rejected.

In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. 2 Greenl. Evid., sect. 311. If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of Congress which respect such possession among miners.

If this plain principle of the common law needed support from adjudged cases, as applicable to the one before us, it may be found in the courts of California in *Atwood* v. *Fricot*, 17 Cal. 37; *English* v. *Johnson*, id. 107; and *Hess* v. *Winder*, 30 id. 355.

The court below erred, therefore, in rejecting this evidence of plaintiffs' prior possession.

Whatever may have been the opinion of other courts, it has been the doctrine of this court in regard to suits on contract ever since the case of the *Washington, Alexandria, & Georgetown Steam Packet Co.* v. *Sickles* (24 How. 333), and in regard to actions affecting real estate, since *Miles* v. *Caldwell* (2 Wall. 35), that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also, that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell* v. *County of Sac*, 94 U. S. 351; *Davis* v. *Brown*, id. 423.

The rejection of the record of the suit of *Rankin* v. *Campbell and Others* was in direct conflict with this doctrine. In that case Rankin had brought an action of the same character as the one he is now defending, against the parties who are now plaintiffs, and had a verdict and judgment against him. The record in that case, as in this, shows that one party claimed under Mining Claim No. 2, in Green Horn Gulch, and the other under Mining Claim No. 8, in Confederate Gulch. The issue in both cases was to which claim did the disputed piece of mineral deposit belong; and if that issue was not clear, it was competent, under the decisions we have cited, to show by parol proof that the controversy was over the same locality, and that the issue had, therefore, been decided against Rankin.

And this proof the plaintiffs offered, in connection with the record of the former suit. The exclusion of this evidence was error.

The principal ground on which the court rejected all this evidence, and all other evidence offered by the plaintiffs, is, that at the same term of the court, and before the trial, one of the plaintiffs, in support of an application for a continuance, made an affidavit, in which he stated that he expected to prove by an absent witness that he had destroyed the original record and laws of Green Horn Gulch, in which the plaintiffs' claim

is located; that said records and laws established the size, lines, boundaries, and location of Claim No. 2 below discovery in said gulch, and that said records showed that the predecessors of the plaintiffs in interest possessed and occupied this claim, in accordance with the local rules.

This affidavit, made in support of an application for continuance, which was overruled, the judge, of his own motion, treated as part of the record, and as before him on the trial, though not offered by either party; and as well as we can understand it, excluded all other evidence of the possession and location and validity of the plaintiffs' claim, because this lost record was the best evidence, and all other was secondary or inferior.

It is difficult to argue this proposition seriously. The affidavit was in no judicial sense before the court on the trial, and could only be used, if at all, when introduced by one of the parties for some legitimate purpose. If it had been so presented by the defendant, it plainly showed that this better evidence was destroyed and could not be produced, and was a sufficient foundation for the use of secondary evidence.

But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisition, the terms and rules for acquiring and transferring mining rights, as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact.

Whatever may be the effect given to the record of mining claims under sect. 5 of the act of Congress approved May 10, 1872 (17 Stat. 92), it certainly cannot be greater than that which is given to the registration laws of the States, and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title.

The Supreme Court of the Territory argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiffs did not introduce first of all proof of their

mining records which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the *locus in quo*, were all unavailing and inadmissible.

We know of no rule of law which justifies this action.

The judgment of the Supreme Court of Montana will be reversed, and the cause remanded to that court with directions to order a new trial; and it is

So ordered.

UNITED STATES *v.* PUGH.

1. The act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 id. 375), authorizes the recovery in the Court of Claims of the proceeds of property captured and, without judicial condemnation, sold by the military authorities after July 17, 1862, and before March 12, 1863, if such proceeds were accounted for and credited by the Secretary of the Treasury to the abandoned and captured property fund.
2. Where, in a suit arising under those acts, no direct proof was given that the proceeds of the sale of the property were paid into the treasury, if the circumstantial facts which are established by the evidence are set forth in the finding of the Court of Claims, which it sends here as that upon which alone its judgment was rendered, and they are, in the absence of anything to the contrary, the legal equivalent of a direct finding that such proceeds were so paid, this court will not on that account reverse the judgment.
3. The judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is, if the question is properly presented, subject on appeal to be here reviewed; and where the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record.
4. *United States* v. *Crusell* (14 Wall. 1), *Same* v. *Ross* (92 U. S. 281), and *Intermingled Cotton Cases* (id. 651), so far as they bear upon the rule requiring, on an appeal from the Court of Claims, a finding by that court of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them, cited and explained.

APPEAL from the Court of Claims.

This was an action, brought by Walter Pugh against the United States, to recover the proceeds of certain property. The Court of Claims found the following facts: —

1. In December, 1862, the claimant was in possession as owner of a plantation in Louisiana. The sugar and molasses described in the petition were a part of the products of such plantation, and were stored thereon, and in the possession of the claimant's agents.

2. In December, 1862, this said sugar and molasses were seized by the military forces of the United States, and turned over to a military commission, known as the sequestration commission, on the 12th of January, 1863. The commission was directed by general order No. 8, Department of the Gulf, "to sell at public auction all property in its possession that has not been or may not be claimed or released, except such as may be required for the use of the army, and turn over the proceeds thereof to the chief quartermaster." The said sugar and molasses were then in the possession of the commission. On the 4th of February, 1863, the commission caused the same to be sold, with other property, at public auction in New Orleans. By the accounts kept by the commission, it appears that the net proceeds of the sugar and molasses amounted to $4,362.23. It does not appear specifically that the proceeds were paid over to the chief quartermaster of the Department of the Gulf; but it appears, and the court find the fact to be, that he received money at various times in the year 1863 from the sales of sugar and molasses in New Orleans, to the amount of $33,796.02. For this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury to the abandoned and captured property fund in the treasury.

3. That, as appears from the accounts of the chief quartermaster, the said amount of $33,796.02 was received by him as the net proceeds of sales of sugar and molasses in New Orleans, and the whole of said amount was received in and subsequent to the month of February, 1863. That it does not appear what became of the fund resulting from the said sale of claimant's sugar and molasses, unless the same was paid over to the chief quartermaster of the Department of the Gulf, in pursuance of said order of General Banks, and was included in said sum of $33,796.02.

4. On June 13, 1863, the said commission notified the agent

of Mrs. Walter Pugh, wife of the claimant, who had applied for the release of a portion of the said proceeds, that the application was denied.

Upon these facts the claimant had judgment for $4,362.23. The United States thereupon appealed to this court.

Mr. Assistant Attorney-General Smith for the appellant.
Mr. Edward Janin, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Two questions are presented by the finding of facts in this case, to wit: —

1. Does the Abandoned and Captured Property Act, as extended by the act of July 2, 1864 (13 Stat. 375), authorize a recovery in the Court of Claims for the proceeds of property captured and sold by the military authorities, without judicial condemnation, after July 17, 1862, and before March 12, 1863, but accounted for and credited by the Secretary of the Treasury to the abandoned and captured property fund in the treasury?

2. Does it appear that the proceeds sued for in this case were actually paid into the treasury?

The first of these questions has been often the subject of consideration in the Court of Claims, but has never, until now, been brought here for determination. It was first decided adversely to the United States as early as 1867, in *Barringer's Case* (3 Ct. of Cl. 358); and although that court has ruled the same way many times since, no appeal was taken by the government until the rendition of this judgment in 1876. Under these circumstances, we ought not to disturb what may fairly be considered a rule of decision in that court acquiesced in by the United States, unless the error is manifest.

The Abandoned and Captured Property Act was undoubtedly intended to be prospective only in its operation. It provided the mode by which that class of property was thereafter to be collected and disposed of, and directed what should be done with the proceeds. By the act of July 17, 1862 (12 Stat. 589), the seizure of certain kinds of property owned by those engaged in the rebellion, and an application of the property or its pro-

ceeds to the support of the army of the United States, were authorized. This act contemplated, however, a condemnation of the property by judicial proceedings *in rem* instituted in the name of the United States in some court having jurisdiction of the territory within which the property was found, or to which it might be removed. The title did not pass by a seizure under the authority of this act until a decree of condemnation was rendered.

The sixth section of the Abandoned and Captured Property Act made it the duty of every officer or soldier of the army of the United States who took or received any abandoned property, or cotton, sugar, rice, or tobacco, from persons in the insurrectionary districts, or who had it under his control, to turn it over to the treasury agent provided for in the act, and take a receipt therefor. As the property captured in this case had been sold by the sequestration commission before this act took effect, no question arises as to whether, after the act did take effect, the property should have been turned over to the proper treasury agent, or proceeded against for condemnation under the act of 1862. Having been converted into money by the action of the capturing military authorities, without judicial condemnation, there was nothing left for the treasury agent to do; and as the property had been released from custody, there could be no proceeding against it *in rem*.

By sect. 8 of the act of July 2, 1864, sects. 1 and 6 of the Abandoned and Captured Property Act were extended so as to include every description of property mentioned in the act of 1862. This has been supposed by the Court of Claims to give that court jurisdiction over cases for the recovery of money actually paid into the treasury as the proceeds of property captured after July 17, 1862, and before March 12, 1863. *Barringer's Case*, *supra*; *Mrs. Minor's Case*, 6 Ct. of Cl. 393; *Terry Carne's Case*, 8 id. 277; *Miss Moore's Case*, 10 id. 375. It is also understood to have been the practice of the executive departments of the government from the beginning to credit the abandoned and captured fund in the treasury with the proceeds of all property captured after July 17, 1862, and before March 12, 1863, paid over to the quartermasters, and accounted for by them in their settlements with the Treasury Department.

No distinction was made in this particular between captures after March 12, 1863, and those before. It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *Edward's Lessee* v. *Darby*, 12 Wheat. 210. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the executive for so long a time. Besides, the interpretation which has been given the act is in strict accordance with the well-settled policy of the government not to enforce the right of capture during the late war against the property of the inhabitants of the insurrectionary districts without giving the owners an opportunity of proving in a court of justice that, although they were in law enemies, they were in fact friends of the United States. Under the act of 1862 this proof might be made in the suit for condemnation, and under the Abandoned and Captured Property Act, in a suit instituted to recover the proceeds in the treasury. Under these circumstances, it can hardly be considered a forced construction of the act of 1864 to hold, as has been done, that it was intended to subject the proceeds in the treasury, of property captured after July 17, 1862, and sold without judicial condemnation before March 12, 1863, to the same suits that were allowed in cases of captures and sales after that date. If this practice is not supported by the exact letter of the law, it is by the spirit, and it is certainly just. We are not disposed to change it.

The second question presents for consideration a subject of much importance connected with the practice under our rule, in reference to appeals from the Court of Claims, which requires "a finding" by that court, "of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them." The ultimate fact to be determined in this case is whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the treasury. No direct proof to that effect has been given, but if shown at all, it is by way of inference from certain circumstantial facts which have been established by the evi-

dence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone the judgment was rendered, and as the case stands, the question we are to decide is whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence. These facts are not evidence, in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is, in the absence of any thing to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the treasury, the judgment is right. Otherwise, it is wrong. The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof; and the question of practice to be settled is whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal.

From what is said in *Ross' Case* (12 Ct. of Cl. 565), and by the reporters in a note (11 id. 344), we are led to suppose that the Court of Claims understands that our decisions in *United States* v. *Ross* (92 U. S. 281) and *Intermingled Cotton Cases* (id. 651) leave this question somewhat in doubt. To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence

in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped, and their legal effect as a whole determined. If the case could come here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the court, had been agreed upon by the parties, and their agreement embodied in the record.

In *United States* v. *Crusell* (14 Wall. 1), the question was whether the particular facts found justified the conclusion that the money sued for had been paid into the treasury; and inasmuch as the legal presumption is, in the absence of any thing to the contrary, that the officers of the government perform their duties when called upon to act in their official capacities, we thought that the law would infer from the facts found that the money which ought to have been paid over by a quartermaster to his superior officer was actually paid over, and that in this way it had reached the treasury. So in *Intermingled Cotton Cases* (*supra*), when it was found that the cotton of the several claimants contributed to and formed part of the captured mass from which the cotton sold was taken, we concluded that the claimants were entitled to their respective shares of the money in the treasury as the proceeds of the sale. In *United States* v. *Ross* (*supra*), however, we thought a similar conclusion from the particular facts there found was too remote, and so reversed the judgment and sent the cause back for a new trial. The premises we considered too uncertain to justify the inference that had been drawn. We thought independent and material facts were wanting, and that the law would not

raise the presumption from what did appear that the plaintiff was entitled to recover. The difficulty in that case was not as to the power of this court to act upon the facts as found, but as to the sufficiency of the facts to support the judgment.

Upon the facts found in this case we have no difficulty in presuming that the money sued for is in the treasury, within the meaning of the Abandoned and Captured Property Act. The sequestration commission was directed to sell captured property, and turn the proceeds over to the chief quartermaster. The property in question was sold, and an account of sales stated by the commission. The case shows that at various times during the year 1868 the chief quartermaster received from the commission the proceeds of sugar and molasses sold, amounting in the aggregate to $33,796.02, and that this amount was all duly accounted for to the treasury, and there passed to the credit of the fund. This has always been treated in that department as equivalent to an actual payment into the treasury. In June, 1863, the commission refused the application of the wife of the claimant for a restoration of the proceeds. This raises the presumption that down to that time the money had not been released; and as it is specially found that it does not appear what did become of the money unless it was paid over, as it should have been, to the chief quartermaster, we think the law will presume it was disposed of as the order of the commanding general required it should be. If any evidence to the contrary exists, the burden was cast upon the United States to produce it. Until the presumption in favor of the claimant is repelled, the law gives him the right to the judgment he has obtained.

Judgment affirmed.

TRANSPORTATION COMPANY v. WHEELING.

Steamboats which ply between different ports on a navigable river may, under a State statute, be taxed as personal property by the city where the company owning them has its principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon, demandable under those laws, have been duly paid.

ERROR to the Supreme Court of Appeals of the State of West Virginia.

This was an action of assumpsit brought for the recovery of the tax paid under protest to the city of Wheeling, by the Wheeling, Parkersburg, and Cincinnati Transportation Company, the owner of certain steamboats used by it in navigating the Ohio between that city and Parkersburg and the interme diate places on both sides of the river, in the States of West Virginia and Ohio. The vessels were of greater burden than twenty tons, and were duly enrolled and licensed under the act of Congress. The company was incorporated under the laws of West Virginia, and its stock was partly owned in that State and partly in Ohio. Its principal office was in Wheeling. The vessels started from that city on their voyages, and when not running were laid up there. They were assessed according to their value as personal property of the company, and the tax was collected under the laws of West Virginia, authorizing the city to "assess, levy, and collect an annual tax for the use of the city on personal property in the city." The right of the State to impose a tax on such vessels was denied by the company, as in violation of art. 1, sect. 10, par. 3, of the Constitution, which declares that "no State shall, without the consent of Congress, lay any duty of tonnage," and of art. 1, sect. 8, par. 3, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." The Court of Appeals of West Virginia held the tax in question not to be within these provisions of the Constitution, and affirmed the judgment in favor of the city rendered by the court of original jurisdiction. The company sued out this writ.

Mr. Montgomery Blair for the plaintiff in error.

National vessels, or vessels duly enrolled and licensed under the laws of the United States to carry on inter-state commerce, are not subject to State taxation. The residence of the owners is immaterial. *State Tonnage Tax Cases*, 12 Wall. 204. And in view of that and other decided cases, it must be conceded that if the tax in question had been measured by the carrying capacity or tonnage of the vessels, it would be illegal; but it is contended that the constitutional prohibition is avoided, by taxing them according to their value. The company denies this, and maintains that the doctrine is contrary to the principles established by the rulings of this court in respect to the provisions of the Constitution bearing upon the question involved.

In *Cooley* v. *Board of Wardens, &c.* (12 How. 299), it was held, in effect, that any tax operating as a charge on such vessels, even if indirectly imposed, would be a tonnage duty, although levied under the name of pilot duties or penalties, and "that it is the thing, and not the name, which is to be considered." To the same effect is *Steamship Company* v. *Portwardens*, 6 Wall. 31. In that case, Louisiana imposed a tax of five dollars upon each vessel, without reference to its tonnage. This court held that the tax was void as a tonnage duty and as a regulation of commerce. A duty imposed on a ship by a State was declared to be within the constitutional prohibition.

It is contended by the city that this tax is not a duty on the ship, because not so *eo nomine;* and that the Constitution excepts shipping from taxation only when the law attempts to tax it by its description as shipping. Now, the vessels in question are just as much within the description of things taxed by the West Virginia statute as if it had specifically taxed them by name; for it is as ships that they are assessed, and not as so much timber and iron. As the thing is prohibited and not the name, the prohibition certainly applies here.

In support of the decision of the State court there are cited *dicta* of Mr. Justice McLean in *Passenger Cases* (7 How. 287), of Mr. Justice Clifford in *State Tonnage Tax Cases* (*supra*), and certain expressions in *Hays* v. *The Pacific Mail*

Steamship Co., 17 How. 596, and in *Morgan* v. *Parkham*, 16 Wall. 473.

These *dicta* tend to sustain the views of the State court; but the question now involved is presented here for the first time, and they are in conflict with the principles actually decided by the court.

The right accorded to the States by Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland* (4 Wheat. 316), to tax the interest of their citizens in the bank of the United States, whilst exempting the bank from such taxation, seems to be the origin of these *dicta*. But there is no analogy between that case and this. Shipping has not the double character of the bank as a public agency and as private property, and does not owe its exemption to any implications, which, arising from its being a public agency, exempt it only in that character from taxation leaving it subject thereto as private property, according to its value. Whilst recognized, in all respects, as private property, it is exempt by the express terms of the Constitution. This exemption extends to any form or amount of taxation upon a ship enrolled and licensed under the laws of the United States; and the reason therefor given by the court in *Steamship Company* v. *Portwardens* (*supra*), is that "the prohibition upon the States levying duties upon imports and exports would have been insufficient, if it had not been extended to ships which serve as vehicles of commerce." In *Gibbons* v. *Ogden* (9 Wheat. 1), the language of the court is, "A duty of tonnage is as much a tax as a duty on imports or exports, and the reason which ensured the prohibition of these taxes extends to this also." Hence all the reasoning which the court has applied to prevent any State taxation upon imports by "varying the form without varying the substance," is equally applicable to inhibit the States from imposing any tax upon shipping.

The argument in *Brown* v. *Maryland* (9 Wheat. 419), in favor of the right of the States to tax imports, is substantially that by which the validity of the tax in question is sought to be maintained; namely, that the tax was a personal one, and that only "an import tax" was prohibited. The court declared the tax to be illegal, because *it operated as a tax on imports*, and they

were not subject to any form of State taxation. Now, as shipping is put by the Constitution precisely upon the same footing as imports, any tax upon property, whilst it continues in the form of shipping, is as illegal as a tax upon property whilst it remains in the condition of imports.

The fact that the vessels were assessed in their home port is immaterial. A tonnage tax assessed there has been held to be prohibited; and as the prohibition is not limited to a tonnage tax strictly so called, but extends to any duty, whether imposed directly or indirectly, or in any manner upon a ship, the principle involved here would seem to have been decided for the company.

Nor does it affect the question that vessels are not enumerated in the tax law as subjects of taxation. If exempt at all, they would be equally so by their description as personal property as by their description as ships, — it being held by this court that the prohibition forbids not only "a duty proportioned to the tonnage of the vessels," but "any duty on the ship." It is, therefore, unrestricted. They are the tools of that foreign and inter-state trade which it was intended to withdraw absolutely from State control, and, like the mechanic's tools, which the States have exempted from taxation, are as exempt from a general tax on personal property as from a specific duty on the articles.

Whether the vessels be taxed as personal property or specifically, the effect is to tax foreign and inter-state commerce.

If it be urged that as the tax is proportioned to the value of the vessel, and forms a part only of the common burden imposed upon personal property within the State, commerce cannot be injuriously affected by it, we reply in the language of the court in *Brown* v. *Maryland*, to the suggestion that the State might be trusted not to tax imports or exports to its own prejudice, that the Constitution has not left the question open.

No counsel appeared for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, no-

can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal government. *State Tonnage Tax Cases*, 12 Wall. 204.

Taxes levied by a State upon ships or vessels as instruments of commerce and navigation are within the clause of the Constitution which prohibits the States from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or to the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.

Pending the controversy in the subordinate State court, the parties by consent filed in the case an agreed statement of facts, from which and the pleadings it appears that the plaintiffs commenced an action of assumpsit against the defendants to recover back certain sums of money which the latter involuntarily paid to the former as taxes wrongfully assessed, as they allege, upon four certain steamboats which they owned, and which for four years or more they employed in carrying passengers and freight between the port of Wheeling and other ports on the Ohio River.

It appears that the plaintiffs are an incorporated company organized under the law of the State, and that the defendants are a municipal corporation chartered as a city under the law of the same State. Authority is vested in the city to assess, levy, and collect an annual tax, under such regulations as they may prescribe by ordinance, for the use of the city, on personal property in the city, not to exceed in any one year fifty cents on every one hundred dollars of the assessed valuation thereof. By the same law it is provided that personal property shall be deemed to include all subjects of taxation which the assessors, acting under the laws of the State, are or shall be by law required to enter on their books as such property for the purpose of State taxation. Pursuant to that law, taxes were assessed

for the several years mentioned against the plaintiffs for the appraised value of the four steamboats and the furniture of the same, which they owned and used as aforesaid, it appearing that the plaintiffs' principal place of business was Wheeling, and that three of the steamboats were usually lying at the wharf or at the bank of the river within the corporate limits of the city.

Throughout the whole period each of the steamboats was duly enrolled and licensed as coasting vessels under the laws of the United States, and the agreed statement shows that the plaintiffs paid for each all dues, fees, and charges which were properly demandable under those laws. Payment of the taxes was made under protest and in order to escape the seizure and sale of the steamboats.

Service was made, and the parties having waived a jury and filed an agreed statement of facts as before stated, submitted the case to the court of original jurisdiction. Hearing was had, and the court rendered judgment in favor of the defendants. Exceptions were filed by the plaintiffs, and they removed the case into the supreme court of the State, called the Court of Appeals, where the judgment of the subordinate court was affirmed. Though defeated in both of the State courts, the plaintiffs sued out the present writ of error and removed the cause into this court.

Since the transcript was entered here, the plaintiffs have assigned for error that the State Court of Appeals erred in holding that the taxes levied are not within the constitutional prohibition that no State, without the consent of Congress, shall lay any duty of tonnage.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States, entitled to the privileges secured to such vessels by the act for enrolling and licensing ships or vessels to be employed in the coasting trade. 1 Stat. 205, 287.

Authorities to show that the States are prohibited from subjecting any such ship or vessel to any duty of tonnage is scarcely necessary, as that proposition is universally admitted;

the only question which can properly arise in the case presented for decision being whether the tax as imposed by State authority is or is not a tonnage duty, within the meaning of the Constitution. Tonnage duties cannot be levied; but it is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.

Power to tax for the support of the State governments exists in the States independently of the national government; and it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States, nor any restraining compact in the Constitution, the power in the States to tax for the support of the State authority reaches all the property within the State which is not properly regarded as the instruments or means of the Federal government. *Nathan* v. *Louisiana*, 8 How. 73; *Brown* v. *Maryland*, 12 Wheat. 419; *Weston* v. *City Council of Charleston*, 2 Pet. 449.

Beyond question these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of a State extends to every thing which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government, whose laws, made in pursuance of the Constitution, are supreme. *McCulloch* v. *Maryland*, 4 Wheat. 429; *Savings Society* v. *Coite*, 6 Wall. 604.

Annual taxes upon ships and vessels for the support of the State governments as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts, in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property. Assessments of the kind, when

levied for municipal purposes, must be made against the owner of the property, and can only be made in the municipality where the owner resides.

Though a ship, when engaged in the transportation of passengers, said Mr. Chief Justice Taney, is a vehicle of commerce, and within the power of regulation granted to Congress, yet it has always been held that the power to regulate commerce, as conferred, does not give to Congress the power to tax the ship, nor prohibit the State from taxing it as the property of the owner, when he resides within their own jurisdiction; and he adds, that the authority of Congress to tax ships is derived from the express grant of power in the eighth section of the first article, to lay and collect taxes, duties, imports, and excises; and that the inability of the States to tax the ship as an instrument of commerce arises from the express prohibition contained in the tenth section of the same article. *Passenger Cases*, 7 How. 283, 479.

Support to that view is also derived from one of the numbers of the Federalist, which has ever been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of our fundamental law. It is there maintained that no right of taxation which the States had previously enjoyed was surrendered, unless expressly prohibited; and that the right of the States to tax was not impaired by any affirmative grant of power to the general government; that duties on imports were a part of the taxing power; and that the States would have had a right, after the adoption of the Constitution, to lay duties on imports and exports if they had not been expressly prohibited from doing so by that instrument. Federalist, No. 32. From which it follows, if the writer of that publication is correct, that the power granted to regulate commerce did not prohibit the States from laying import duties upon merchandise imported from foreign countries; that the commercial clause does not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the power to regulate commerce; and that the right of taxation in the States remains over every subject where it before existed, with the exception only of those expressly or impliedly prohibited.

Neither imposts nor duties on imports or exports can be levied by a State, except what may be absolutely necessary for executing its inspection laws, nor can a State levy any duty of tonnage without the consent of Congress. State power of taxation is doubtless very comprehensive; but it is not without limits, as appears from what has already been remarked, to which it may be added, that State tax laws cannot restrain the action of the national authority, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value not excepted as aforesaid, within the sovereignty of the State; but they cannot reach the means and instruments of the Federal government, nor the administration of justice in the Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of Congress.

Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as part of itself; and hence it follows that the power to tax may be exercised at the same time upon the same objects of private property by the State and by the United States, without inconsistency or repugnancy. *McCulloch* v. *Maryland*, *supra*; *Providence Bank* v. *Billings*, 4 Pet. 514.

Such power exists in the State as one conferred or not prohibited by the State Constitution, and in the Congress by express grant. Hence the existence of such powers is perfectly consistent, though the two governments in exercising the same act entirely independent of each other as applied to the property of the citizens.

Legislative power to tax, as a general proposition, extends to all proper objects of taxation within the sovereign jurisdiction of a State; but the power of a State of the Union to lay taxes does not extend to the instruments of the national government, nor to the constitutional means to carry into execution the powers conferred by the Federal Constitution. Tax laws of the State cannot restrain the action of the national government, nor can they circumscribe the operation of any constitutional act of Congress. They may extend to every object of value belonging to the citizen within the sovereignty of the State, not within the express exemptions of the Consti-

tution, or those which are necessarily implied as falling within the category of means or instruments to carry into execution the powers granted by the fundamental law. *Day* v. *Buffington*, 3 Cliff. 387.

Power to levy taxes, said Mr. Chief Justice Marshall, could not be considered as abridging the right of the States on that subject, it being clear that the States might have exercised the power to levy duties on imports or exports had the Constitution contained no prohibition upon the subject; from which he deduces the proposition that the prohibition is an exception from the acknowledged power of the States to levy taxes, and that the prohibition is not derived from the power of Congress to regulate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 201.

States, said Mr. Justice McLean, cannot regulate foreign commerce; but he held in the same case that they may tax a ship or other vessel used in commerce the same as other property owned by its citizens, or they may tax the stages in which the mail is transported, as that does not regulate the conveyance of the mail any more than the taxing the ship regulates commerce, though he admitted that the tax in both instances affected in some degree the use of the property, which undoubtedly is correct. *Passenger Cases*, *supra*.

Enrolled vessels engaged in conveying passengers and freight, which were owned by citizens of the State of New York, entered the port of San Francisco, and while there were compelled to pay certain taxes. Payment having been made under protest, the owners of the vessels brought suit to recover back the amount; and Mr. Justice Nelson, in disposing of the case here, in behalf of the court, held "that the vessels were not in any proper sense abiding within the limits of California so as to become incorporated with the other personal property of the State; that they were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid," — which shows to a demonstration that the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596.

Ships, when duly registered or enrolled, are instruments of commerce, and are to be regarded as means employed by the United States in execution of the powers of the Constitution, and therefore they are not subject to State regulations. *Sinnot* v. *Davenport*, 22 id. 227.

Such instruments or means are not given by the people of a particular State, but by the people of all the States, and upon principle as well as authority should be subjected to that government only which belongs to all.

Taxation, beyond all doubt, is the exercise of a sovereign power, and it must be admitted that all subjects over which the sovereign power of a State extends are objects of taxation; but it is equally clear that those objects over which it does not extend are exempt from State taxation, — from which it follows that the means and instruments of the general government are exempt from taxation. *McCulloch* v. *Maryland*, *supra*.

Tonnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition, for the reason that the prohibition, when properly construed, does not extend to the investments of the citizens in such structures.

Duties of tonnage, says Cooley, the States are forbidden to lay; but he adds that the meaning of the prohibition seems to be that vessels must not be taxed as vehicles of commerce, according to capacity, it being admitted that they may be taxed like other property. Cooley, Const. Lim. (4th ed.) 606.

"Vessels are taxable as property," says the same author; and he adds that "possibly the tax may be measured by the capacity, when they are taxed only as property and not as vehicles of commerce;" which may be true if it clearly appears that the tax is to the owner in the locality of his residence, and is not a tax upon the ship as an instrument of commerce. Cooley, Taxation, 61.

"Whatever more general or more limited view may be entertained of the true meaning of this clause," says Mr. Justice Miller, "it is perfectly clear that a duty, tax, or burden imposed under the authority of the State, which is by the law imposing it to be measured by the capacity of the vessel, and

is in its essence a contribution claimed for the privilege of arriving and departing from a port in the United States, is within the prohibition." *Cannon* v. *New Orleans*, 20 Wall. 577; *Peete* v. *Morgan*, 19 id. 581; *State Tonnage Tax Cases*, *supra*.

Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same. Corresponding views are expressed by Mr. Burroughs in his valuable treatise upon Taxation. He says that vessels of all kinds are liable to taxation as property in the same manner as other personal property owned by citizens of the State; that the prohibition only comes into play where they are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property. Burroughs, Taxation, 91; *Johnson* v. *Drummond*, 20 Gratt. (Va.) 419.

Property in ships and vessels, say the Court of Appeals of Maryland, before the Federal Constitution was adopted, was within the taxing power of the State; and they held that such property since that time, when belonging to a citizen of the State living within her territory and subject to her jurisdiction, and protected by her laws, is a part of his capital in trade, and, like other property, is the subject of State taxation. *Howell* v. *The State*, 3 Gill (Md.), 14; *Perry* v. *Torrence*, 8 Ohio, 522.

Beyond all doubt, the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property, nor is it pretended that the taxes were levied as duties of tonnage. Congress has prescribed the rates of measurement and computation in ascertaining the tonnage of American ships and vessels, and in the light of those regulations Burroughs says that the word "tonnage" means the contents of the vessel expressed in tons, each of one hundred cubical feet. p. 89.

Homans says that the word has long been an official term, intended originally to express the burden that a ship would carry, in order that the various dues and customs levied upon

shipping might be imposed according to the size of the vessel, or rather in proportion to her capability of carrying burden. Homan's Dict., Com. and Nav., Tonnage.

Tested by these definitions and the authorities already cited, it is as clear as any thing in legal decision can be, that the taxes levied in this case are not duties of tonnage, within the meaning of the Federal Constitution. Taken as a whole, the contention of the plaintiffs is not that the taxes in question are duties of tonnage, but their proposition is that ships and vessels, when duly enrolled and licensed for the coasting trade, are not subject to State taxation in any form, and that the owners of the vessels cannot be taxed for the same as property, even when valued as other personal property, as the basis of State or municipal taxation.

Opposed as that theory is to the settled rule of construction, that the commercial clause of the Constitution neither confers, regulates, nor prohibits taxation, it is not deemed necessary to give the theory much further consideration. *Gibbons* v. *Ogden*, *supra*. By that authority it is settled that the power to tax, and the power to regulate and prohibit taxation, are given in the Constitution by separate clauses, and that those powers are altogether separate and distinct from the power to regulate commerce; from which it follows, as a necessary consequence, that the enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property.

Judgment affirmed.

TICE v. UNITED STATES.

The Secretary of the Treasury having been authorized by sect. 15 of the act of March 2, 1867 (14 Stat. 481), to "adopt, procure, and prescribe" meters to be used by distillers, adopted the meter of A., April 18, 1867. If the Secretary revoked his order, it was agreed that A. should be paid for all the instruments he might then have completed or have in process of completion, provided the number of sets in process of manufacture at any one time should not exceed twenty. A joint resolution, passed Feb. 3, 1868 (15 id. 246), declared that, pending an examination thereby directed, all work on the construction of meters under the direction of the Treasury Department should be suspended, and that in the mean time no further contract should be made under the act of March 2, 1867. Power to adopt and prescribe meters was, by the act of July 20, 1868 (id. 125), conferred upon the Commissioner of Internal Revenue, who, Sept. 16, 1868, adopted A.'s meter, reserving the right to entirely revoke his order adopting it, and, on the part of the government, direct the discontinuance of its manufacture. June 8, 1870, the commissioner revoked his previous order, except as to meters then on hand or in process of construction not exceeding twenty sets; and A. was informed that neither the government nor any department or officer thereof was or would be responsible for or on account of any meters. The use of A.'s meter was entirely discontinued June 8, 1871. He then had fourteen and a half sets on hand, for the value of which he brought this suit, contending that the contract made by the Secretary in 1867, to pay for the instruments on hand at the time of the discontinuance to the extent of twenty sets, was adopted by the commissioner in 1868, and was made part of all the subsequent proceedings. It does not appear that any of the fourteen and a half sets on hand June 8, 1871, were on hand or in process of manufacture June 8, 1870. *Held*, that A. was not entitled to recover.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. J. W. Douglass for the appellants.

The Solicitor-General, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

By sect. 15 of an act approved March 2, 1867 (14 Stat. 481), the Secretary of the Treasury was authorized to "adopt, procure, and prescribe" for use hydrometers, weighing and gauging instruments, meters, or other means for ascertaining the strength and quality of spirits subject to tax, or for preventing or detecting frauds by distillers of spirits.

On the 18th of April, 1867, the Secretary adopted the Tice

meter, and prescribed its use in distilleries, upon certain agreed conditions fully set forth in a letter to the inventor. Among those conditions were these: —

"The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter or system, or at any time to revoke the order adopting the meter, and to discontinue their manufacture on behalf of the government. If the first meter shall prove successful when subjected to the test above set forth, and the government shall subsequently revoke the adoption of the meter and order a discontinuance of proceedings, you will be paid such sum as may be determined upon in the manner hereinafter stated for all instruments which you may have completed or have in process of completion at the time of such revocation: *Provided*, that at no time shall you have more than twenty sets in process of manufacture at any one time, unless directions shall be given hereafter for the manufacture of a larger number."

By joint resolution passed Feb. 3, 1868 (15 id. 246), Congress directed the appointment, by the Secretary of the Treasury, of a commission which, in connection with the then-existing commission of the Academy of Science, should examine all meters and mechanical contrivances or inventions presented to them which were intended to measure, test, and ascertain the productiveness of grain or other articles prepared for distillation, or the actual quantity and strength of distilled spirits subject to tax, produced therefrom, the result of such examination to be communicated to Congress. The act declared "that pending the action of said commission, and until their report be made, and a meter shall be by law adopted, all work on the construction of meters, under the direction of the Treasury Department, be and is hereby suspended." "And in the mean time no further contract shall be made by the Secretary of the Treasury" under the act of March 2, 1867.

By an act approved July 20, 1868 (id. 125), power to "adopt and prescribe" meters was conferred upon the Commissioner of Internal Revenue. That officer, Sept. 16, 1868, decided to adopt and prescribe the Tice meter, and upon certain conditions, to which the inventor assented, he directed the latter "to proceed with their construction." Among the conditions were these: —

"*Third*, The one hundred and seventeen meters now finished will be immediately made ready for delivery, and thirty-six now in process of manufacture will be completed as soon as possible. The manufacture of others, to the number of five hundred in all, is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at one time, unless a greater number is directed by the Commissioner of Internal Revenue.

"*Fourth*, The commissioner reserves to himself, or his successor in office, the right at any time to adopt any improvement of the meter or system, or to revoke the order adopting the meter, and to direct on the part of the government a discontinuance of its manufacture."

On the 7th of June, 1870, the commissioner ordered the discontinuance of that kind of Tice meter known as the second or "credit" meter, and required distilleries to use thereafter the Tice sample meter, and the Tice automatic meters adapted for use as sample meters.

On the succeeding day, June 8, 1870, the commissioner addressed to Tice a letter, in which, among other things, he gave notice that instructions and regulations in force prior to Oct. 8, 1869, "relating to the ordering and shipment and payment for the meters invented by you and prescribed for use in distilleries, remain in force only in respect to meters heretofore delivered, and also those you may now have on hand or in process of construction, not exceeding twenty sets." In that letter the commissioner further says.: "Any regulations heretofore prescribed, addressed to you by or from this office, directing or authorizing you to construct, or proceed with the construction of, or to furnish, meters, especially those of Sept. 16, 1868, are revoked, except as aforesaid. New rules, regulations, and orders have been prescribed, a copy of which is herewith enclosed, it being distinctly understood that neither the government of the United States, nor any department or officer thereof, is or will be responsible for or on account of any spirit meters, or the attachment or adjustment thereof."

By a formal order made on June 8, 1871, the further use of Tice's spirit meters was finally discontinued, and all existing orders prescribing the same were revoked. At the date of

that order Tice had on hand fourteen and one half sets of meters, worth $25,000, for which sum, and for storage up to April 8, 1873, the estate of Tice rendered an account against the government on the 12th of April, 1873. The amount was approved by the then commissioner; but payment being refused, this action was brought against the government for the recovery of the sum claimed.

From the judgment of the Court of Claims in favor of the government this appeal is prosecuted.

We concur with the learned counsel for appellants in the proposition that the contract made April 18, 1867, by the Secretary of the Treasury with Tice was not abrogated by the joint resolution of Feb. 3, 1868. By the terms of the resolution it was only suspended until final action by the commission, whose report was designed as the foundation of a statute which would designate the kind of meters which should be adopted. But express authority to make a new contract was conferred by the act of July 20, 1868, upon the Commissioner of Internal Revenue. That officer was empowered to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments or meters, as he might deem necessary. The extent of the authority intended to be conferred upon him is manifested by the third section of the act of July 20, 1868, which required every owner, agent, or superintendent of a distillery to furnish and attach, at his own expense, such meter as the commissioner might adopt and prescribe for use. It was by virtue of its provisions that the agreement of Sept. 16, 1868, was made. According to any fair construction of its terms, in the light of attendant circumstances, the government was bound, as under the agreement of April 18, 1867, to pay for such sets, not exceeding twenty, as Tice might have on hand at the time their use should be discontinued. The provision to that effect in the contract of April 18, 1867, is so reasonable and just, that we shall not presume that the contract of Sept. 16, 1868, was intended to establish a different rule of compensation to the inventor. But we do not perceive, however, that all this justifies the conclusion that the government was under any legal obligation to pay for the meters which Tice had on hand

on June 8, 1871, and for the value of which the account in question was presented. By the express words of the agreement of Sept. 16, 1868, the commissioner had the right at any time to revoke the order adopting the meter, and to direct the discontinuance of its manufacture on behalf of the government. That power was partially exerted by the order of June 7, 1870, which dispensed with the further use of all Tice meters except the sample meters, or the automatic meters adopted for use as sample meters. But the power of revocation and discontinuance was fully exerted by the sweeping order of June 8, 1870, which, reserving the rights of Tice as to all meters theretofore delivered, and as to such as were then on hand or in process of construction, not exceeding twenty sets, revoked all previous regulations which directed or authorized the inventor to construct, or proceed with the construction of, or to furnish, meters, and especially the regulation of Sept. 16, 1868. By that order distinct notice was given to the patentee that neither the government of the United States nor any department or officer thereof was or would be responsible for or on account of any spirit meters, or the attachment or adjustment thereof. The order of June 8, 1870, did not, perhaps, discontinue the use of meters altogether, but it clearly furnished notice that the patentee could not look to the government for protection or reimbursement as to any meters thereafter constructed by him and used by distilleries. The meters for which the account was rendered were on hand on June 8, 1871, when all existing orders prescribing the same for use were absolutely revoked and the further use of Tice meters discontinued. Had they been on hand and in the process of construction at the date of the order of June 8, 1870, we would not doubt the liability of the government for their value. But no such fact is found, and we suppose no such fact could have been established.

While we do not agree with the court below in all the reasons assigned in support of the conclusion reached, we think its judgment is in accordance with the law.

Judgment affirmed.

MYRICK *v.* THOMPSON.

By the ninth article of the treaty of Prairie du Chien, proclaimed Feb. 24, 1831 (7 Stat. 330), a certain tract of country in the then Territory of Minnesota was reserved for Sioux half-breeds, "they holding by the same title and in the same manner that other Indian titles are held." By the act of July 17, 1854 (10 id. 304), the President, upon their relinquishment of all their rights and interest in the tract so reserved, was authorized to cause to be issued "certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants, which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements: *Provided*, that no transfer or conveyance of any of said certificates or scrip shall be valid." A. made a contract, whereby, for a valuable consideration, he bound himself to secure, upon the location of certain of said certificates, title to the land thereby located to be lawfully vested in B. *Held*, 1. That the contract is not in violation of said treaty or said act. 2. That the certificates may be located lawfully not only on unoccupied lands, but upon such as are occupied, provided that the occupants thereof waive the provision for their benefit, and consent to such location. 3. That the words, "upon which they have respectively made improvements," have exclusive reference to "other unsurveyed lands," and do not qualify the provision touching "other unoccupied lands."

ERROR to the Supreme Court of Minnesota.

The facts are stated in the opinion of the court.

Mr. C. K. Davis for the plaintiffs in error.

Mr. E. C. Palmer, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Lands in the Territory of Minnesota had been set apart for the use and benefit of the Sioux half-breeds, and the President was empowered to make a new arrangement with them, and for that purpose was authorized to issue to such of them as would relinquish to the United States their title to the reservation certificates or scrip for an amount of land equal to what they would be entitled in case the reservation should be divided among them; and the act provided that the certificates or scrip might be located upon any of the lands within the reservation not occupied by actual and *bona fide* settlers of the

tribe, . . . or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements. 10 Stat. 304.

Certificates or scrip of the kind were held by the defendant as attorney in fact of the half-breeds named in the petition, and it appears that he placed the same with his powers of attorney in the hands of the plaintiff, with the view to the location of the same for the benefit of the beneficiaries. Contemporaneous with the delivery of those papers the plaintiff and defendant entered into the written agreement set forth in the petition, in which the defendant agreed that upon the location of the scrip he would secure the title to the land located to be lawfully vested in the plaintiff, in consideration of which the plaintiff agreed to pay the defendant the sum of $2,800 in one year from the date of the note, and to secure the payment of the same upon the land located as soon as he, the plaintiff, shall acquire the title to the same.

Difficulties attended the location, which were overcome in the manner set forth in the petition; and the plaintiff avers that he made all the locations as stipulated in the written agreement, and alleges that the defendant neglects and refuses to comply with his part of the agreement; that instead of doing so he has fraudulently caused the lands located to be conveyed to his wife, the other defendant in the case, and that she now holds the same, or the principal part thereof, without consideration and in fraud of the just rights of the plaintiff in this action. Many other matters are alleged in the complaint, which, being immaterial in this investigation, are omitted.

What the plaintiff demands against the defendants is the judgment and decree of the court for a specific performance of the said written agreement, that the defendants convey to him one-fourth part of the lands first described and the entire fee in all the parcels last described, and that the decree of the court shall stand and be effectual to convey the title to the plaintiff.

Service was made, and the defendants appeared and filed an answer setting up several defences, no one of which involves any Federal question. They admit the execution of the written

agreement, and that the certificates or scrip were located by the plaintiff. Nothing of the kind is in controversy; but they deny that the quantity of land located is correctly set forth, or that the fees and expenses paid by the plaintiff exceeded fifty dollars. Sales and deeds of the lands located they admit were made by the first-named defendant as alleged, but they aver in the answer that they first and in repeated instances requested the plaintiff to pay the note and take the title, and that he refused so to do, alleging as a reason that he could not raise the money; and they deny that the sales were made with intent to cheat or defraud the plaintiff. Every such imputation is denied; and the defendants set up as a defence that the arrangement contracted in the written agreement was, by the mutual consent and understanding of the parties, abandoned, and that the defendants have ever since and now hold the note as cancelled, and are ready and willing to surrender the same to the plaintiff.

Sundry explanations are also given in respect to the several conveyances through which the title to the lands passed into the hands of the wife of the principal defendant, from which it appears that the deed to her was a voluntary conveyance; but the defendants allege that she subsequently purchased the same of the beneficiaries, for which deeds she paid a valuable consideration to the respective grantors.

Proofs were taken, and the parties heard by the court without a jury; and the record shows that the court made a special finding of the facts, and rendered judgment in favor of the plaintiff, to the effect that the defendants convey to the plaintiff, his heirs and assigns for ever, the land and lots therein described, to which description of the land and lots is appended the following: "And that this decree shall stand in place of a conveyance of said premises to said plaintiff by said defendants, and be effectual to convey the title to said land and lots to the plaintiff, his heirs and assigns for ever."

Due appeal was taken by the defendants to the Supreme Court of the State, where the parties were again heard upon the finding of facts certified from the subordinate court, and the State Supreme Court affirmed the judgment of the State District Court. Proceedings in these courts being at an end,

the defendants sued out a writ of error and removed the cause into this court.

Appended to the writ of error is the assignment of errors filed by the defendants, which is that the plaintiff has no ground of action except upon the agreement set out in his complaint, which is void under the treaty of July 15, 1830, made at Prairie du Chien, and the act of Congress approved July 17, 1854 7 Stat. 330; 10 id. 304.

Sufficient appears to show that the theory of defence presented in the assignment of errors was not set up in the answer nor does the record furnish any support to the proposition that any such question was raised or decided in the court of original jurisdiction. Evidence to support the theory that the question stated in the assignment of errors was discussed and decided in the Supreme Court of the State is found in the opinion of that court as published in the record, and inasmuch as that question is raised in the assignment of errors exhibited in the brief, the court is of the opinion that the case to that extent is properly here for re-examination.

Enough has already been remarked to show that the parties waived a jury in the court where the action was commenced, and submitted the evidence to the determination of the court invested with that jurisdiction. Special findings were made by the court as the basis of their conclusions of law, and on appeal the Supreme Court of the State adopted the findings of the subordinate court as the basis of fact for their judgment. Viewed in the light of these suggestions, it is quite clear that the findings of fact exhibited in the record are not the proper subject of review in this court, nor will it be necessary to reproduce those findings, as they are fully set forth in the record and in the official volume of the State reports. *Thompson* v. *Myrick*, 20 Minn. 207.

Reference either to the record or to that case will show that the subordinate court found as a conclusion of law that the plaintiff below was entitled to judgment, directing and decreeing that the defendants should convey to the plaintiff, his heirs and assigns for ever, the one undivided fourth part of the lands so located by the plaintiff as aforesaid in the name of the said beneficiaries, and the whole of the seventeen lots otherwise

described; and that in case the defendants should fail to convey the lands as directed, the decree of the court shall stand in place of such conveyance.

From the opinion of the Supreme Court it also appears that the defendants, through their counsel, made several points to show that the judgment of the subordinate court was erroneous, the first of which was that the agreement set out in the complaint is void under the said act of Congress and the treaty made at Prairie du Chien. By the ninth article of the treaty a certain tract of land was set apart for the half-breeds of the Sioux nation, and the United States agreed to suffer said half-breeds to occupy said tract of country, they holding by the same title and in the same manner that other Indian titles are held. 7 Stat. 330.

Certain rights of occupancy were doubtless guaranteed to the half-breeds by that article of the treaty; but the record furnishes no ground to suppose, or even to suspect, that the agreement in the case did or could interfere with or impair any right which the treaty conferred, which is all that need be said upon that subject. Congress, by the act referred to, authorized the President to make an exchange with the half-breeds for their rights in that reservation, by issuing to them certificates or scrip for the amount of land before described, which said certificates or scrip the act provided might be located upon any of the lands within the reservation, . . . or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the government, upon which they have respectively made improvements.

Attempt, it seems, was made in the argument of the case in the Supreme Court of the State to show that the terms of the agreement were in conflict with the provisions of the act of Congress; but the answer which that court made to the proposition, though brief, is satisfactory and decisive. Outside of the pleadings, the defendants, it seems, contended in the Supreme Court of the State that by the terms of the agreement between the parties to it the scrip was to be located on land occupied by the plaintiff, and consequently that the agreement was void as contravening the regulations which the act of Con-

gress prescribed; to which the court responded, that the provision authorizing the scrip to be located upon "unoccupied lands" was evidently framed for the benefit and protection of occupants of the land, and that if the occupant saw fit, as the plaintiff did in this case, to locate the scrip upon land occupied by himself, there could be no objection to the location, as the occupant might waive his right to object and abandon his occupancy, and that if he did, the effect would be to restore the premises to the condition of unoccupied land.

Plain as that proposition is, it is not deemed necessary to pursue the argument, as the statement of it is sufficient to secure for it universal assent.

Suppose that is so, still it is insisted by the defendant that the agreement is repugnant to the provisions of the act of Congress, because it contemplates that the location of the scrip may be made upon land other than that upon which the beneficiaries "have respectively made improvements;" to which the State Supreme Court answered, that the clause of the act referred to qualifies the phrase "other unsurveyed lands," instead of the phrase "other unoccupied lands," as is supposed by the defendants, which, in the judgment of the court, is the correct construction of the provision in the act of Congress applicable to the subject.

Support to that view is also derived from the contemporaneous construction given to it by the Commissioner of the General Land-Office, as appears from the circulars issued by him for the guide and direction of all engaged in making such locations under the act of Congress authorizing the President to issue such certificate or scrip to the half-breeds therein mentioned. 1 Lester, Land Laws, 628; 2 id. 369.

Holders of such certificates or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the State Supreme Court overruled the defence, and referred to one of their former decisions, assigning the reasons for their conclusion that the defence was not well founded. *Gilbert et al.* v. *Thompson*, 14 Minn. 544.

Since the cause was submitted, the opinion of the court in that case has been carefully examined, and the court here

concurs with the State court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive. For these reasons the court is of the opinion that the Federal questions involved in the record as set forth in the assignment of errors were decided correctly by the State Supreme Court.

Six other defences were set up by the defendants, as appears by the opinion of the State Supreme Court, no one of which involves any Federal question. They are as follows: 1. That the agreement is void on common-law grounds on account of the relation which the principal defendant bore to the grantees of the scrip. 2. That by the terms of the agreement the payment of the note by the plaintiff is a condition precedent to the right to specific performance. 3. That the contract is not one which a court of equity will enforce, because it is not a contract for a conveyance, but for services to be rendered by the plaintiff to procure a conveyance from the said beneficiaries. 4. That the findings of the court show that the agreement was abandoned by mutual consent. 5. That the circumstances disclosed show that it would be inequitable to enforce the agreement. 6. That the action is barred by the Statute of Limitations.

Remarks are not necessary to show that none of these several defences present any Federal question for re-examination; and having already decided that the Federal questions involved in the case were correctly decided by the State Supreme Court, the settled rule of this court is that the judgment must be affirmed, without determining the other questions not of a Federal character. *Murdock* v. *City of Memphis*, 20 Wall 590.

Judgment affirmed.

PHELPS v. MCDONALD.

1. A., a British subject resident in this country, was duly declared a bankrupt by the proper district court, Dec. 10, 1868, and the conveyance of his estate was in the usual form made by the register to an assignee. At that time he had a claim against the United States, of which the commission organized under the treaty between the United States and Great Britain of May 8, 1871 (17 Stat. 863), took cognizance, and made an award for its payment. *Held*, that the claim passed to the assignee.
2. The statutory requirement, that all suits by or against an assignee in bankruptcy shall be brought within two years from the time the cause of action accrued, relates to suits by or against him with respect to parties other than the bankrupt.
3. Although a court of equity has not within its territorial jurisdiction the real or the personal property which is the subject-matter in controversy, it may, having the necessary parties before it, compel, by appropriate process, the performance of every act, which, if done voluntarily by them according to the *lex loci rei sitæ*, would give full effect to its decree *in personam*.

APPEAL from the Supreme Court of the District of Columbia.

This was a bill filed Sept. 8, 1874, by Thomas J. Phelps against Augustine R. McDonald. By an amendment, William White was made a defendant. It alleges that McDonald was on his petition declared a bankrupt by the District Court of the United States for the Southern District of Ohio, Dec. 10, 1868; that Phelps was appointed assignee, and received, Feb. 12, 1869, in due form the assignment of all the bankrupt's real and personal estate; that in the schedule of assets filed by the bankrupt appears this item: "Claim against General Osborne, of U. S. Army, and others, for burning, in January and February, 1865, from one to two thousand bales of my cotton in Arkansas and Louisiana;" that this is the only description of the claim, except that in the duplicate schedule filed in the office of the register of said court the amount is stated at seven thousand to eight thousand bales, and the claim, with others, is designated as "worthless;" that McDonald, March 17, 1869, received his discharge from the court, and that thereafter Phelps, having petitioned for and obtained an order to sell certain accounts, notes, and judgments of the bankrupt, sold them at public sale, White becoming the purchaser of the uncollected accounts belonging to the estate for the sum of

twenty dollars; that the purchase was made for McDonald, with money furnished by him, and the claim transferred to him by White.

The bill further alleges, that, prior to the filing of his petition in bankruptcy, McDonald had a just and valid claim against the United States for certain cotton destroyed by the army during the late civil war; that being a British subject, although for many years a resident of this country, he prosecuted the claim before the joint British and American commission organized under the treaty of May 8, 1871, between the United States and Great Britain; that the claim was finally adjudged to be valid; and that, Sept. 25, 1873, the commission awarded the sum of $197,190 "to be paid in gold by the government of the United States to the government of her Britannic Majesty in respect of the above claim."

To the bill of complaint is annexed as an exhibit McDonald's memorial to the joint commission, which shows his claim as one arising from purchases of cotton made by him in the insurrectionary States under permits from the Secretary of the Treasury and letters from the President of the United States, and alleges the subsequent repeal of the laws authorizing such permits before he could remove the cotton, and its final destruction by the Federal army.

The complainant insisted that this claim, thus arising from an alleged breach of an obligation of the United States to protect McDonald in the possession of the cotton destroyed, is not that described in the schedule of the assets which were sold by the assignee to the defendant White, and afterwards assigned by him to McDonald; that the schedule did not describe a claim against the United States arising from a violation of permits given by the President, and that the designation of it as "worthless" added to the description given was well calculated to mislead; that the rules of the joint commission required all assignments of claims to be stated, which McDonald did not do, but prosecuted his claim upon his original title; that the award was made to him on that title, and not on that derived by purchase through White from the assignee in bankruptcy; and that said award ought rightfully to be paid to the complainant as assignee for the benefit of the creditors of said

bankrupt, whose claims, as stated in his schedule, amount to $177,380, the only sum ever realized from his estate being the twenty dollars derived from the sale to White.

The bill then alleges that McDonald assigned said award to White, "who took the same with full knowledge that said McDonald had no valid title thereto;" that the United States paid to the agent of the British government in the city of Washington said award, and he is about to pay the same to McDonald. The bill prays for an injunction restraining McDonald and White, or either of them, from receiving said award, and for a decree that said fund be held in trust for the creditors of said McDonald, and be subject to the complainant's rights as assignee in bankruptcy.

Process was personally served on both defendants. They answered, and the complainant filed a replication. A temporary injunction was awarded. Subsequently, by consent of parties, a decree was made that one half of the amount of the award be received by the defendants to pay the expense of prosecuting the claim before the joint commission, and the other half placed in the hands of George W. Riggs, as receiver, to await the final action of the court; and that McDonald execute all orders, receipts, and acquittances necessary to enable the receiver to obtain the fund.

The defendants withdrew their answer and filed a demurrer, the grounds whereof are, in effect, that the court below had no jurisdiction of the case, but that the exclusive jurisdiction remained with the District Court of the United States for the Southern District of Ohio; that the bill was not filed within two years from the time when the cause of action accrued; that the claim against the United States did not give any right of action either to McDonald or to the complainant as his assignee in bankruptcy; that if it did, such right was in tort, and did not pass to the assignee; that it appears by the bill and the said treaty that no ground or right of action against the United States ever existed in favor of said assignee by virtue of the assignment in bankruptcy.

The special term of the court sustained the demurrer, and decreed that the bill be dismissed, and that the receiver pay over to the defendants the money in his hands. The com

plainant having appealed to the general term, where the decree was affirmed, he brought the case here.

Mr. F. P. Stanton and *Mr. George F. Appleby* for the appellant.

An assignee in bankruptcy may sue in any court of competent jurisdiction to recover the assets of the bankrupt. *Johnson's Assignee* v. *Bishop*, 1 Woolw. 326; *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516; *Eyster* v. *Gaff et al.*, id. 521; *Burbank* v. *Bigelow et al.*, 92 id. 179; *Claflin* v. *Houseman, Assignee*, 93 id. 130.

The suit was not barred by the Statute of Limitations. The right of the assignee as against McDonald did not accrue until the award was made. *Clark* v. *Clark et al.*, 17 How. 315.

McDonald had at the date of his petition in bankruptcy a claim against the United States for the destruction of his cotton. Its validity is averred in the bill, and is conclusively established by the decision and award of the commission. *Comegys et al.* v. *Vasse*, 1 Pet. 193. Such a claim passes by the register's deed to the assignee in bankruptcy (Rev. Stat., sect. 5046), although it be incapable of enforcement by legal proceedings. *Comegys et al.* v. *Vasse, supra; Milnor et al.* v. *Metz*, 16 Pet. 221; *Clark* v. *Clark et al., supra; Sheppard* v. *Taylor*, 5 Pet. 707; *Frevall* v. *Bache*, 14 id. 95. Even if the fund arising from the allowance of the claim had been in England and in the hands of the British government, that fact would not defeat the jurisdiction of the court below, to which the parties were amenable, and against whom a decree could be rendered and enforced by process *in personam*. 2 Story, Eq. Jur., sect. 899 *et seq.*

Mr. William A. Cook and *Mr. C. C. Cole, contra.*

The assets of the bankrupt, including the claim in question, were purchased by White, who transferred it to McDonald, in whom was thus vested a perfect title as against the assignee. There having been no concealment of the condition or the supposed value of the claim, the case is not within the principle of *Clark* v. *Clark et al.*, 17 How. 315.

At the time of the sale by the assignee this claim was worthless, having only a possibility of a value.

As the fund must be considered as being in England, the

interest in, or the title to, a claim thereon did not by the assignment in bankruptcy pass to the assignee. *Oakey* v. *Bennett*, 11 How. 33; Lawrence's Wheaton (2d ed.), pp. 162, 163; *Perry* v. *Barry*, 1 Cranch, C. C. 204; *Blaine* v. *Drummond*, 11 Brock. 62; *Hunt* v. *Jackson*, 6 Blatchf. 349.

The fund was under the control of the British government to be distributed, and the decree of a court in this country could not operate upon it. Treaty of 1871, art. 12; Story, Eq. Pl., sect. 489. Were the law otherwise, the court below could have no jurisdiction, except on the ground of fraud, trust, or contract, and neither is alleged in the bill. *Blake's Case*, 1 Cox, 393; *Penn* v. *Baltimore*, 1 Ves. 444; *Massie* v. *Watts*, 6 Cranch, 148.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the Supreme Court of the District of Columbia. The case was decided in that court upon a demurrer to the bill and amended bill of the complainant. The demurrer was sustained and the bills were dismissed. The complainant is the appellant, and the action of the court below is brought before us for review.

The demurrer admits the facts alleged. The question is only as to their sufficiency to entitle the appellant to the relief which he seeks. Without reproducing the case in detail as it is in the record, we shall address ourselves to the salient points which it presents for our consideration.

A chose in an action lies at the foundation of the controversy. It is thus described by McDonald in the schedule of his assets filed with his petition in bankruptcy: "Claim against General Osborne, of U. S. Army, and others, for burning, in January or February, 1865, from 1,000 to 2,000 bales of my cotton in Arkansas and Louisiana."

The late bankrupt law provided that as soon as an assignee was appointed, the judge or register should convey to him "all the estate, real and personal, of the bankrupt." Rev. Stat., sect. 5044. And that there should vest in the assignee, among other things, all the bankrupt's "rights of action for property, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention or injury to" his property.

Comegys et al. v. *Vasse* (1 Pet. 195) has an important bearing upon this case. It arose under the bankrupt law of April 4, 1800. 2 Stat. 19. The fifth and sixth sections authorized the commissioners to convey to the assignees "all the real and personal estate, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever."

Under this act Vasse was declared a bankrupt and received his certificate of discharge. He had been an underwriter, and as such received from those whom he had insured and indemnified assignments of their claims against France, Great Britain, and Spain. In his return of his effects to the commissioners, pursuant to the statute, he named the claims against France and England, but not the claim against Spain. The omission was supposed to have been honestly made, because there was then not the slightest *spes recuperandi* with respect to that country. The claim was regarded as hopelessly worthless.

More than twenty years later, under a treaty between Spain and the United States, an award was made for its payment. There, as here, the money was demanded by the bankrupt and by his assignees, and the same lines of argument to which we have listened in this case were pursued by the counsel in that case with consummate learning and ability. The judgment of the court was delivered by Mr. Justice Story. It sustained the demand in behalf of the creditors, and is exhaustive and conclusive.

It is needless for us in this case to go over the same field of discussion. A few remarks, however, grounded chiefly upon that authority will not be out of place. It will be observed that the claim against Spain, and the claim against the United States, here in question, rested upon the same foundation, and that each was surrounded by like circumstances.

There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly

upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. It is but a short time since our government could be sued, and it can be done now only under the special circumstances defined by the statute. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. If the demand be just, and recognized as valid by the law of nations, the claimant, or his government, if the latter choose to do so, may still press it upon the attention of the alien government.

If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re* — possibilities coupled with an interest and claims growing out of property — pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrong-doer be a government or an individual, is clearly within this category. *Erwin* v. *United States*, 97 U. S. 392. The register's deed in this case bears date Feb. 12, 1869. The title then became vested in the appellant. Thereupon he stood in the place of McDonald, and was clothed with all the rights which had belonged to the bankrupt before he became such. On the 25th of September, 1873, within less than five years after the assignment, an award was made by the mixed commission, sitting under the treaty between the United States and Great Britain, for the payment of $187,190 in satisfaction of the claim.

In the light of these considerations, it would be sheer fatuity to deny the substantial character and value of the claim at the time of the transfer by the register's deed.

But it is insisted that the alleged sale under the order of the District Court divested the title of the assignee.

According to the bill, the order was to sell "certain accounts, notes, judgments," &c. The exhibit referred to as containing "copies of the petition, order, and report of the sale" is not in the record. Whether the order was broad enough to include the claim in question, and whether the report showed that it

was sold, are questions which, in the state of the record as it is before us, we are unable to determine. Doubts in such cases are to be resolved against the pleader. But if the affirmative be conceded as to both these points, a fatal objection still remains. McDonald went into voluntary bankruptcy. His petition did not disclose that he was a British subject. We have given the description of the claim in the schedule filed with his petition. It was brief and vague, and gave no definite information. In a duplicate schedule filed with the register he pronounced it "worthless." In assigning to him exempted property, the register and assignee unite in saying, "No other exemptions made, because there are no assets, except some old claims which upon their face called for large amounts, and upon inquiry I find them totally or entirely worthless." He failed to make known that he bought the cotton under a permit from the Treasury Department, accompanied with an order from the President directing the officers of the army and navy to aid him in getting it beyond the lines of the insurgent territory, and that it was lost to him by reason of a sudden and unexpected change in the legislation of Congress, thus creating as strong an equity in his favor against the United States as could well exist.

His memorial to the mixed commission was sworn to on the 25th of November, 1871. In that document his losses are stated with fulness and particularity. It is in striking contrast with the meagreness of the schedules. When there had been a transfer of the claim, the rules of the commission provided that "the mode and manner of such transfer must be stated." The memorial was silent upon this subject. This asset — soon to realize nearly $200,000 — was sold for $20! The amended bill avers, and the demurrer admits, that "the said White at the sale of assets in the bill mentioned purchased the same at the request of said McDonald, and with money furnished by him."

Such is the case touching the point in hand, as it is presented by the demurrer of the appellees to the allegations of the complainant. Considering the sale in the light of this showing, we cannot hesitate to hold it invalid. We are not unmindful that the question may come again before the lower

court, and perhaps before this court, upon the answers of the appellees and the testimony adduced by the parties, and that it may then be the hinge of the controversy. It is our purpose in such case to leave both courts unfettered by any thing in this opinion, and in all respects as free to decide, one way or the other, as if the subject had not been before considered by either tribunal.

The bankrupt law required that all suits by or against the assignee should be brought within two years from the time the cause of action accrued. Rev. Stat., p. 982, sect. 5057.

But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application. If this were otherwise, the cause of action here did not accrue until the award was made and McDonald set up a claim to the fund awarded. *Clark* v. *Clark*, 17 How. 315.

Lastly, it is said that the suit is in effect a suit against the British government, and that hence the court below had no jurisdiction of the case.

In *Clark* v. *Clark* (*supra*), where the contest was between the bankrupt and his assignee, touching a fund in the treasury derived from a foreign government, the Secretary, though not a party, was enjoined from paying it over until the rights of the contestants were settled in the suit then pending.

In *Millnor et al.* v. *Metz* (16 Pet. 221), also, the fund in controversy was in the treasury. The Secretary refused to recognize the claim of either party, and left them to adjust the conflict by a judicial determination. The contest was ended by a decree in the court below, which was affirmed by this court, perpetually enjoining one of the parties from receiving the money.

This objection assumes facts which have no existence. The British government is in no wise, either in form or substance, a party to the record, and no final or coercive judicial action is sought except with respect to McDonald and White. In the progress of the case below, George W. Riggs was appointed receiver, with authority to collect the fund. Of course he could do nothing without the voluntary concurrence of the just and eminent British agent, who was in possession.

By consent of parties the fund was delivered to the receiver, and in the final decree brought here for review he was directed to pay it over to the appellees, less certain charges and expenses incurred in procuring the award, and he was thereupon to be discharged from his office. We have heard no objection from any quarter to the placing of the fund in the hands of the receiver. Certainly none has been suggested in behalf of the sovereignty whose rights are said to have been invaded.

But suppose, as has been suggested, that the money were in the British exchequer, at the seat of the home government, still the court below acquired jurisdiction of the parties and of the cause, and had an important duty to perform.

Such commissions as that which made the award here in question usually decide only as to the validity of the claim and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide upon the ownership of the claim. They have no means of compelling the attendance of parties or witnesses, no rules of pleading or procedure applicable to such a case, and the foreign element in the tribunal, at least, cannot be supposed to have any knowledge of the law according to which the question is to be determined. The validity of the claim depends upon the law of nations; its ownership, upon the local jurisprudence where the transfer is alleged to have been made.

Hence, *Comegys* v. *Vasse*, *Clark* v. *Clark* (*supra*), and other like cases have arisen, involving conflicting claims to the fund awarded, and nothing else.

In this case, whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right. This court has twice decided that a British subject can sue the United States in the Court of Claims, because an American citizen is permitted to sue the British government by a petition of right. The act of Congress creating the court requires reciprocity. *United States* v. *O'Keefe*, 11 Wall. 178; *Carlisle* v. *United States*, 16 id. 147.

If the claim of the assignee were presented to the British government by a petition of right, and the claim of McDonald were also presented, the parties, in the absence of any judicial

determination, would doubtless be required to settle their controversy by interpleading, or in some other appropriate form of litigation. If the appellant shall be finally successful in this case, and the record should be presented with his petition, no such question could arise, and judgment in his favor must necessarily follow. Conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense, and other inconveniences of a suit before a foreign tribunal? The adjudication would be as binding in one case as in the other.

Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story, Eq., sect. 899; *Miller* v. *Sherry*, 2 Wall. 249; *Penn* v. *Lord Baltimore*, 1 Ves. 444; *Mitchell* v. *Bunch*, 2 Paige (N. Y.), 606.

The decree of the court below will be reversed, and the cause remanded with directions to proceed in conformity to this opinion; and it is

So ordered.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, dissenting.

The treaty under which the award was made, which is the subject-matter of this suit, provides for the payment to Great Britain of claims for injury to British subjects, and the award in this case in express terms orders the money to be paid to the agent of that government in this country. *Comegys* v. *Vasse* and *Clark* v. *Clark*, cited in the opinion, are cases of awards made in favor of the United States for the use of its citizens.

While the money so awarded is properly a fund within the

jurisdiction of our courts, as are also our own citizens, I do not think those courts have any control over the British government or its agents in the distribution of the fund awarded to them.

It does not appear from any thing in the record, as I read it, that the fund in controversy has ever been voluntarily paid into court by the agent of that government. It is an indelicate attempt by the courts of this country to seize *in transitu*, for its own citizens, what by treaty this government has agreed to pay to another government for its subject.

UNIVERSITY v. PEOPLE.

A statute of Illinois, passed in 1855, declares that all the property of the Northwestern University shall be for ever free from taxation. As construed by the assessors and by the Supreme Court of the State, a statute of 1872, conforming taxation to the new constitution of 1870, limited this exemption to land and other property in immediate use by the institution. *Held*, 1. That the latter statute impaired the obligation of the contract of exemption found in the statute of 1855. 2. That whether the statute of 1855 is a valid contract, or is void by reason of its conflicting with the State Constitution of 1848, under which it was made, is a question on which the judgment of that court can be reviewed here. 3. That the lots, lands, and other property of the university, the annual profits of which, by way of rent or otherwise, are devoted to the purposes of the institution as a school, could, within the meaning of that Constitution, be exempted by statute from taxation, and that the exempting power of the legislature was not limited to real estate occupied or in immediate use by the university.

ERROR to the Supreme Court of the State of Illinois.

At the June Term, 1875, of the County Court of Cook County, Illinois, application, in the manner prescribed by the revenue law of the State, was made by the county collector, for a judgment against lands in that county, delinquent for the taxes levied and assessed upon them for the year 1874, for State, county, town, school, and municipal corporation purposes. In the list were embraced some four hundred and twenty-seven distinct parcels belonging to the Northwestern University.

Pending this application, the University appeared and filed

its objections to judgment being entered against these parcels, and to their sale for delinquent taxes; alleging that, by an act of the legislature of Illinois, approved Jan. 25, 1851, it was created a corporation, and that by an amendment to its charter, made Feb. 14, 1855, all its property of whatever kind or description was declared to be for ever free from taxation for any and all purposes whatever; that by the terms of the charter and amendment the State contracted with it that from and after the passage of the amendment all its property of whatever kind and description should be for ever free from taxation for any and all purposes; that the charter and amendment had been accepted by it and were still in force; and that the taxes complained of had been levied without its assent and in violation of the charter and amendment.

At the trial, it having been admitted that the proper notice and return of the delinquent list had been made as required by law, the collector rested. The university thereupon offered in evidence a stipulation of counsel, that at the time and before the taxes were assessed and levied the parcels enumerated in the objections belonged to, and still belong to, the university, and are leased by it to different parties for a longer or a shorter period, and that all of the parcels are held for sale or lease, for its use and support, and for the objects contemplated in its charter; that the lands which are occupied by buildings or other direct appliances of education are not taxed or included in such parcels; that since the passage of the charter and amendment, the corporation has expended in the erection and purchase of buildings, apparatus, and other facilities and appliances for education, and for the promotion of the objects stated in the charter, over $200,000, realized from donations and the sale of lots and lands, and has built up a university with several departments, in which more than five hundred students are taught the higher branches of learning.

The charter was also offered in evidence. The first section constitutes certain individuals therein named a body corporate under the name of "Trustees of the Northwestern University, with succession, and with power to acquire, hold, and convey real and personal property, and to make by-laws for the government of the institution," &c. The second section regulates

the term of office of the trustees, and requires the board of trustees to hold the property of the institution for the purposes of education, and not as stock for their individual benefit.

The fourth section locates the institution in or near Chicago, and gives the corporators power in their corporate name to take property by gift, grant, conveyance, or devise, and to grant, sell, devise, let, place out at interest, or otherwise dispose of the same for the use of the institution, and to apply the funds collected or the proceeds of the property to erecting buildings, supporting the teachers, officers, and servants of the institution, and procuring books and apparatus. It restricts the amount of land the corporation can hold to two thousand acres, unless it receives the same by gift, grant, or devise.

An amendment to the act of incorporation was approved Feb. 14, 1855. Its third section authorizes the corporation to take, use, lease, and dispose of property coming to the corporation charged with any trust, and to execute the trusts confided to it. Its fourth section is as follows: "That all property, of whatever kind or description, belonging to or owned by the corporation, shall be for ever free from taxation." The fifth section declares the act to be public, and that it shall take effect from its passage.

Another amendment, in force Feb. 19, 1867, changing the name of the corporation to "Northwestern University," authorized it by the latter name to exercise the powers and immunities conferred on it, and making other changes in the number of the board of trustees.

The objections were overruled, and, July 14, 1875, judgment was entered for the delinquent taxes against the lands of the university.

That judgment having been affirmed by the Supreme Court, the corporation sued out this writ of error.

So far as they bear upon this case, the provisions of the Constitution of Illinois of 1848, which was in force when the charter and its amendments were enacted; those of the Constitution of 1870, and of the act of 1872, under which the tax was sought to be collected, — are set forth in the opinion of the court.

The assignment of errors is as follows: —

The Supreme Court erred in adjudging: *First*, That no valid contract existed between the State and the plaintiff in error by virtue of the amended charter granted to and accepted by it, whereby it was protected by the Constitution of the United States from the taxation complained of. *Second*, That the provision of the amended charter exempting the property of the plaintiff in error from taxation was in conflict with the Constitution of the State, and void. *Third*, That the parcels of land described in these proceedings were subject to taxation for State, county, and other purposes for the year 1874, under the Constitution and laws of the State, notwithstanding their exemption by the amended charter.

Mr. Matt. H. Carpenter and *Mr. Wirt Dexter* for the plaintiff in error.

It is well settled that, to confer jurisdiction here to review the decision of a State court, it is not necessary that the record should show *in ipsissimis verbis* that a Federal question was presented, or that the pleadings in the case should either refer to the particular clause in the Federal Constitution relied upon, or set out the general law of the State which is alleged to be in violation of that Constitution. *Furman* v. *Nichol*, 8 Wall. 44; *Murray* v. *Charleston*, 96 U. S. 432, and cases cited; *Murdock* v. *City of Memphis*, 20 Wall. 590.

The question of the invalidity of a State statute and of the authority exercised thereunder, on the ground of their repugnancy to the Constitution, was directly raised and presented below. The Federal right claimed by and decided adversely to the plaintiff was necessarily involved in the judgment rendered. The jurisdiction of this court is therefore clearly established. *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Parmelee* v. *Lawrence*, 11 id. 36; *McManus* v. *O'Sullivan et al.*, 91 U. S. 578; *Bolling* v. *Lersner*, id. 594.

This court has enforced the obligations of similar contracts of exemption. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Humphrey* v. *Pegues*, 16 id. 244; *Pacific Railroad Co.* v. *Maguire*, 20 id. 36; *The Washington University* v. *Rouse*, 8 id. 439; *Home of the Friendless* v. *Rouse*, *supra*.

The enforced collection of this tax is in violation of the contract, if there was one, between the State and the plaintiff in error; and the sole question, therefore, is as to the existence of such a contract. The decision of it requires this court to determine, not only whether the amended charter exempting the institution from taxation is in its terms a contract, but also whether the legislature had the power to grant it.

The decision of a State court, holding that as a matter of construction a particular charter does not constitute a contract, is not binding on this court. The question of construction is an original one to be determined here. *Jefferson Branch Bank* v. *Skelly, supra; Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 117; *Butz* v. *City of Muscatine*, 8 id. 575; *State Bank of Ohio* v. *Knoop, supra; Delmas* v. *Insurance Company*, 14 Wall. 661.

In regard to the exemption of such property as might be deemed necessary for school purposes the Constitution conferred discretion upon the legislature, and the judgment of the latter exercised in making the exemption under consideration is not subject to judicial review. Cooley, Const. Lim. 168, 173; *Luther* v. *Borden et al.*, 7 How. 1; *Bank of Rome* v. *Rome*, 18 N. Y. 42; *People* v. *Mahoney*, 13 Mich. 400; *Wynehamer* v. *People*, 13 N. Y. 429; *People* v. *Draper*, 15 id. 532; *Commonwealth* v. *Hartman*, 17 Pa. St. 119; *Sharpless* v. *Mayor of Philadelphia*, 21 id. 147.

It is a rule of universal application, that a proper respect for a co-ordinate branch of the government requires that a court must be convinced beyond a reasonable doubt before it will declare a law unconstitutional. *Fletcher* v. *Peck*, 6 Cranch, 128; *Ogden* v. *Saunders*, 12 Wheat. 213. The rule is the same whether the question involves the construction of a law or of the Constitution itself. Cooley, Const. Lim. 184, and cases cited; *Twitchell* v. *Blodgett*, 13 Mich. 162; *Martin* v. *Mott*, 12 Wheat. 19; *Mazier* v. *Hilton*, 15 Barb. (N. Y.) 657; *State* v. *County Court of Boone County*, 50 Mo. 317; *Carpenter* v. *Montgomery*, 7 Blackf. (Ind.) 415; *Franklin* v. *State Board of Examiners*, 28 Cal. 178.

In any view, the exemption under consideration was clearly

for school purposes, and should be sustained as a proper exercise of the legislative power.

Such an institution as this university coming into life, without direct donations from the State itself, must have something more than the mere land on which the building stands. There must be a source of revenue which will support its professors, and keep the institution alive. The one is as much a necessity of its success, even of its existence, as the other; and the distinction, that the grounds and buildings thereon and furniture therein are clearly for "school purposes," while property used to erect more buildings, as necessity may require, and buy more furniture and pay teachers, is not for "school purposes," is one without reason, and is an unworthy foundation for an argument with which to sweep away a contract which reposes upon the faith of a great State, and has been confirmed by twenty years of practical acquiescence.

It is a construction which has heretofore received no support from the Supreme Court of Illinois. *Taylor* v. *Thompson*, 42 Ill. 9; *Burr* v. *City of Carbondale*, 76 id. 455.

The correctness of the view sustaining the power to make the exemption is conclusively determined by the contemporaneous and practical construction given by the legislative and executive departments of the government of Illinois, and sanctioned by the long acquiescence of her people.

The principle of contemporaneous and practical construction is expressed in some of the oldest maxims of the law: "*Contemporanea expositio est fortissima in lege;*" "*Optima est legis interpres consuetudo;*" "*A communi observantia non est recedendum.*" This court has frequently recognized and applied the doctrine in construing the Federal Constitution and the laws of Congress. *Stuart* v. *Laird*, 1 Cranch, 299; *Ogden* v. *Saunders*, *supra*; *Prigg* v. *Pennsylvania*, 16 Pet. 589; *Dred Scott* v. *Sandford*, 19 How. 398. It has been illustrated and enforced by the decisions of the ablest State courts. *Rogers* v. *Goodwin*, 2 Mass. 477; *Boyden* v. *Town of Brookline*, 8 Vt. 284; *Ramsey* v. *The People*, 19 N. Y. 41; *Cronise* v. *Cronise*, 54 Pa. St. 255; *People* v. *Maynard*, 15 Mich. 463; *Scanlan* v. *Childs*, 33 Wis. 663; *Johnson* v. *Joliet & Chicago Railroad Co.*, 23 Ill. 202.

The grave errors in the opinion of the learned court below in this case destroy its weight as an authority.

We deny that any case arising on the construction of a statute giving exemption from taxation can be "pertinent" to the construction of a clause in a constitution limiting a legislative power, or that a clause in a statute conferring exemption on an individual, and a clause in a constitution defining or limiting the legislative power to make exemption, can be "like clauses."

But aside from the inherent and marked difference between the cases cited by that court and the case at bar in this particular, it will be found that in all of them there were limiting or qualifying words not found in the clause under consideration, which were the basis of the conclusion of the court.

Mr. James K. Edsall, Attorney-General of Illinois, and *Mr. Consider H. Willett, contra.*

I. The State has passed no subsequent law repealing or impairing any of the provisions or obligations of the amendment to the charter under which the exemption from taxation is claimed.

1. The revenue law passed in 1872 is a mere revision of that of 1853, and makes no substantial change therein, so far as respects the question of the exemption of property from taxation. Session Laws of 1853, p. 3, sects. 1, 3; Gross, Statutes of Ill. (ed. of 1869), p. 580, sects. 45, 47, with the corresponding provisions found in Rev. Stat. of Ill. (of 1874), p. 857, sects. 1, 2.

2. The revenue law of 1872 does not assume to amend or repeal any exemption contained in special charters of private corporations. Nor can it be construed as having that effect, without violating the established rules of construction. A subsequent law, which is general, does not operate as a repeal of a special law upon the same subject, without express words declaring an intention to repeal. *Town of Ottawa* v. *County of La Salle*, 12 Ill. 339; *Covington* v. *East St. Louis*, 78 id. 549; *Board of Supervisors* v. *Campbell*, 42 id. 490; *Tyson* v. *Postlethwaite*, 13 id. 727; *Blain* v. *Baily*, 25 Ind. 165; *State* v. *Newark*, 2 Dutch. (N. Y.) 519; Sedgwick, Stat. and Const. Law (2d ed.), p. 97.

3. In this revision the legislature left all prior special acts

purporting to exempt property of particular corporations from taxation as it found them, and did not attempt to amend or repeal any such acts. If the exemptions claimed were originally void and ineffectual, the general provisions of both the former and present revenue laws of the State prescribing the remedy to enforce the collection of taxes apply to such corporations as well as to all others having property subject to taxation, but otherwise not.

4. The State may lawfully change the remedy for the enforcement of the rights under pre-existing contracts, so long as no substantial right secured by the contract is impaired. *Bank of the State of Alabama* v. *Dalton*, 9 How. 522; *Sampeyreac & Stewart* v. *United States*, 7 Pet. 222. The enactment of laws so changing the remedy as to rights under past contracts cannot be justly regarded as impairing the obligation of such contracts.

5. Cases cited by counsel for plaintiff in error, where there was an actual attempt by subsequent legislation, or the adoption of a new constitution, to amend or repeal former special charters, are inapplicable to the case presented by this record. For example, *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *The Washington University* v. *Rouse*, id. 439; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Pacific Railroad Co.* v. *Maguire*, 20 id. 36; *Delmas* v. *Insurance Company*, 14 id. 661.

So, also, as to cases brought here upon writ of error to the Federal courts, like *Chicago* v. *Sheldon*, 9 Wall. 50; *Humphrey* v. *Peques*, 16 id. 244.

II. This court will not entertain jurisdiction of a case from a State court, merely because the judgment of that court impairs or fails to give effect to a contract.

1. In order to confer jurisdiction upon that ground, there must have been some law of the State, subsequently enacted, which impaired the obligation of the contract; and the validity of such law must have been sustained in the State court against this constitutional objection. *Railroad Company* v. *Rock*, 4 Wall. 177; *Knox* v. *Exchange Bank*, 12 id. 379; *Railroad Company* v. *McClure*, 10 id. 511.

2. The Federal question, if any exists, must be disclosed by the record and proceedings as sent here from the State court, otherwise jurisdiction will not be entertained. *Warfield* v. *Chaffe et al.*, 91 U. S. 690; *Murray* v. *Charleston*, 96 id. 432; *Moore* v. *Mississippi*, 21 Wall. 636; *Smith* v. *Adsit*, 23 id. 868; *Parmelee* v. *Lawrence*, 11 id. 36; *Murdock* v. *City of Memphis*, 20 id. 590.

While it is not essential to confer jurisdiction that the record proper should in express terms show that a Federal question was raised and decided in the State court, yet the fact must exist; and it must be made to appear that such a question was necessarily involved in the decision.

In this case it neither appears from the record, nor otherwise, that the decision of the State court was based upon, or in any manner affected by, any law of the State passed subsequently to the making of the supposed contract, or that any such claim was ever made in that court by counsel on either side.

3. The State court correctly held that, under the Constitution of 1848, the General Assembly could not exempt from taxation the property of colleges not necessary for "school purposes." The express mandate of art. 9, sect. 2, of the State Constitution was, that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." Rev. Stat. of Ill. of 1874, p. 52. All municipal taxes are required "to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." These provisions have ever been regarded by the Supreme Court of Illinois as limitations upon the power of the General Assembly, and, standing by themselves, would have prohibited all exemptions. *O'Kane* v. *Treat*, 25 Ill. 557, 561; *Trustees* v. *McConnell*, 12 id. 138; *City of Chicago* v. *Larned*, 34 id. 203; *City of Ottawa* v. *Spencer*, 40 id. 211; *The People* v. *Barger*, 62 id. 452.

But to obviate this result, the framers of the Constitution introduced into the same article a section defining what property the General Assembly might exempt from taxation, as follows: —

"SECT. 3. The property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious, and charitable purposes, may be exempted from taxation." Rev. Stat. of Ill. (of 1874), p. 52.

The General Assembly had no power to grant exemptions, except so far as authorized by this section; and as to educational, religious, and charitable corporations, the courts of the State have uniformly held that the power was confined to such property as was used directly for the purposes for which the corporations were created, and that it did not extend to property leased for other uses, or held for profit merely, although the rents and profits were applied to the proper purposes of the corporation. *Northwestern University* v. *The People*, 80 Ill. 333; *First Methodist Episcopal Church* v. *Chicago*, 26 id. 482; *Illinois Central Railroad Co.* v. *Irwin*, 72 id. 452.

In these rulings the Supreme Court of Illinois has followed the general current of authority upon analogous questions. *Pierce* v. *Inhabitants of Cambridge*, 2 Cush. (Mass.) 611; *Cincinnati College* v. *The State*, 19 Ohio, 110; *Washburne College* v. *Commissioners of Shawnee County*, 8 Kan. 344; *Kendrick* v. *Farquhar*, 8 Ohio, 197; *Orr* v. *Baker*, 4 Ind. 86; *Trustees of Methodist Episcopal Church* v. *Ellis*, 38 Ind. 8; *State* v. *Newark*, 2 Dutch. (N. J.) 519; *State* v. *Flavel & Fredericks*, 4 Zab. (N. J.) 370; *State* v. *Commissioners of Mansfield*, 3 id. 510; *Railroad* v. *Berks County*, 6 Pa. St. 670; *Wyman* v. *City of St. Louis*, 17 Mo. 335; *Proprietors of Meeting-House in Lowell* v. *City of Lowell*, 1 Metc. (Mass.) 538.

While it is now authoritatively settled that it is within the competency of a State legislature, possessing unrestrained legislative power, to enter into a valid contract exempting property from taxation, it is equally clear that the people of a State may, by constitutional provisions, limit the power of the legislature in this regard.

The Constitution of 1848 did impose such limitations upon the General Assembly of Illinois.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of Illinois, bringing before us a judgment of that court, deciding that

certain property of the plaintiff was liable to taxation, which was resisted, on the ground that it was exempt by a legislative contract.

The university was incorporated by an act of the legislature of the State of Illinois, approved Jan. 28, 1851, which contained the powers necessary to its usefulness as an institution of learning, and, among other provisions, authorized it to purchase and hold real estate to the extent of two thousand acres of land, and receive gifts and devises of land above that amount, which must be sold within ten years. In 1855, the legislature, by an amendment to this charter, appointed three additional trustees, and enlarged its powers, in some respects not very important. But the fourth section of that act is the one supposed to contain the contract on which this case must be decided. It was this: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be for ever free from taxation for any and all purposes."

The State Constitution of 1848, in force when the charter and amended charter above cited were enacted, declares that "the property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious, and charitable purposes, may be exempt from taxation."

The record shows a very large list of lots and lands in Cook County which the plaintiff asserted to be free from taxation under this law, but which were listed for taxes of the year 1874, and about to be sold for their non-payment. By proper judicial proceedings the question arose before the Supreme Court of the State, which held that they were liable to be so taxed.

A motion was made some time before the case was reached for argument in this court, to dismiss it for want of jurisdiction, and was overruled; but the attorney-general of Illinois renews the objection now in connection with the main argument.

This question of jurisdiction to review the judgments of State courts is so frequent, and the principles which govern it so well settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the State court is limited to a construction of the fourth clause of the amendatory charter of 1855, as it is affected by the consti-

tution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not, it is still but the decision of a court construing a contract or a statute, and there is no law of the State impairing the obligation of that contract, within the meaning of the Constitution of the United States.

If this were true in point of fact, the conclusion would be sound, as we have repeatedly held in this court. *Railroad Company* v. *Rock*, 4 Wall. 177; *Railroad Company* v. *McClure*, 10 id. 511; *Knox* v. *Exchange Bank*, 12 id. 379.

But the premises assumed are not justified by the facts. The general revenue law of Illinois, prior to the amendment of 1855 to plaintiff's charter, contained nothing which exempted its property from taxation. When that act was passed, it became a part of the law of the State governing taxation as applicable to the property of the university. The law remained in this condition until the State adopted a new constitution, in 1870, the part of which relating to this subject is in these words:—

"The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

In order to conform the law of the State on the subject of taxation to this provision of the new constitution, the legislature revised its revenue laws in 1872, and in this statute the exemption established was:—

"*First*, All lands donated by the United States for school purposes, not sold or leased. All public school houses. All property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit.

"*Second*, All church property actually and exclusively used for public worship, when the land (to be of reasonable size for the location of the church building) is owned by the congregation."

It was under this law the local officers proceeded in assessing plaintiff's land for taxation, and it was their construction of the

law which was sustained by the Supreme Court. If, therefore, the legislation of 1855 was a contract which exempted the property in question from taxation, and by the law of 1872, as construed by the Supreme Court, it is held liable to taxation, it is manifest that it is the law of 1872 and the Constitution of 1870 which impairs the obligation of that contract, however the court, by an erroneous construction of that contract, may be led to hold otherwise. It is strenuously insisted that these provisions of the Constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the fourth section of the amended charter of 1855, because that section was in excess of the authority conferred by the Constitution of 1848. But this depends on the construction of that contract as affected by the constitution under which it was enacted. If by virtue of that constitution the legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel, which, under a true construction of the Constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the Constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855.

Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken*, 1 Wall. 144; *Delmas* v. *Insurance Company*, 14 id. 668.

The Supreme Court of Illinois, in its opinion found in the record, appears to concede that the act of 1855, to the extent that it was authorized by the State Constitution, was a contract.

"It is not claimed," says the court, "that appellant is in any

sense a public corporation, but it is claimed that the purpose for which it is created is so far beneficial to the public that it affords a sufficient consideration for the grant of exemption from taxation in the amendment, and that when the amendment was accepted and acted on by the corporation it must be held a vested right which cannot be withdrawn by subsequent legislation, because of the provision of the United States which prohibits a State from passing a law impairing the obligation of a contract. If it was competent for the General Assembly to make the exemption, we are not disposed to contest the correctness of their position; but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the Constitution of the United States."

The court thus concedes that there was a contract so far as the legislative power extended.

It is possible, if that question had been fully investigated, and all the facts necessary to decide it were before the court, it might not appear that all the lands subjected to taxation by the judgment of the Supreme Court were bought after the date of the amended charter, or donated on the faith of that exemption.

But it does appear, by a stipulation made for that purpose, that since the granting of said amended charter the corporation "has expended, in the erection and purchase of buildings, apparatus, and other facilities and appliances for education, and for the promotion of the objects stated in and contemplated by the act of incorporation, over $200,000, realized from donations and the sale of lots and lands, and has built up a university, with several departments of learning, in which more than five hundred students are taught the higher branches of learning."

It is, perhaps, a fair inference from this statement, and in deference to the holding of the Supreme Court, that there was such acceptance of this act of 1855, and such investments made on the faith of it, that at least some portion of the property now in question is protected by contract, if the exemption clause lawfully covers it.

It will readily be conceded that the language of the fourth section of the act of 1855 is broad enough for that purpose: "All property, of whatever kind or description, belonging to

or owned by said corporation, shall be for ever free from taxation for any and all purposes." But the argument is, that since the constitution then in force only permitted the legislature to exempt from taxation the property, real and personal, used by the university, in immediate connection with its function of teaching, the statute must be limited to property so used. This was the view taken by the Supreme Court of the State. "By the language of the Constitution," says the court, "while a discretion is conferred on the General Assembly whether to exempt or not, and if it shall determine to exempt, the amount of the exemption, it is clearly restricted in the exercise of this discretion to property for schools and religious and charitable purposes; property for such purposes, in the primary and ordinary acceptation of the term, is property which in itself is adapted to and intended to be used as an instrumentality in aid of such purposes. It is the direct and immediate use, and not the remote or consequential benefit to be derived through the means of the property that is contemplated."

Though the court is here construing the Constitution of its own State, and is, therefore, entitled to our consideration on that ground, as well as for its character and standing for learning and ability, we find ourselves, in the performance of the duty of reviewing this case, compelled to differ with that court in the nature and extent of the constitutional limitation of this contract, as made by the legislature of the same State. For this constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation.

The first observation we have to make is that the Constitution does not say "property used for schools," as the opinion of the court implies. Neither the important word *use* or *schools* is found in the section of the instrument on that subject. If the language were that the legislature might "exempt property for the use of schools," we should readily agree with that court. Indeed, that would be the appropriate language to convey the idea on which the court rests its decision.

The makers of the Constitution, however, used other language because they had another meaning, and did not use that because they did not mean that. They said that the legis-

lature might exempt from taxation "such property as they might deem necessary" (not for the use of schools, but) "for school purposes." The distinction is, we think, very broad between property contributing to the purposes of a school, made to aid in the education of persons in that school, and that which is directly or immediately subjected to use in the school. The purposes of the school and the school are not identical. The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense.

A devise of a hundred acres of land "to the president of the university, for the purposes of the school," would be not only a valid conveyance, but, if the president failed to do so, a court of chancery would compel him to execute the trust; but if he leased it all for fair rent and paid the proceeds into the treasury of the corporation to aid in the support of the school, he would be executing the trust.

When the Constitution, in 1870, came to be reconstructed, its framers had learned something about exemption from taxation, as we shall see by placing the provision in that constitution alongside that of 1848 on the same subject: —

1848.	1870.
"The property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious, and charitable purposes, may be exempt from taxation."	"The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law.'

Here it is only such property as may be exclusively used for school purposes that may be exempted, and this only by a general law.

The general law passed in 1872 to give effect to the change in the Constitution exempted only "the real estate on which the institutions of learning are located, not leased by such institutions or otherwise used with a view to profit." This is

what the Supreme Court says was meant by the Constitution of 1848; but if it was, it took a deal of change in the language when the framers of the new constitution and of the new tax law came to express the same idea. We cannot come to the conclusion that they were intended to mean the same, but that the later law was designed to limit the more enlarged power of the earlier one.

If our construction of the Constitution of 1848 is sound, the judgment of the Supreme Court must be reversed; for the stipulation of facts on which the case was tried says that "it is admitted that all the lots and lands mentioned and described in the objections filed in said proceeding for judgment, whereon said taxes are levied, excepting improvements on the same, are leased by said university to different parties for a longer or shorter period, and that all said lots and lands are held for sale or lease, for the use and support of said institution and the objects contemplated by said charter."

We are of opinion that such use and such holding bring the lots within the class of property which by the Constitution of 1848 the legislature could, if it deemed proper, exempt from taxation, and that the legislature did so exempt it.

The judgment of the Supreme Court of the State will be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion; and it is

So ordered.

MR. JUSTICE STRONG and MR. JUSTICE BRADLEY did not sit in this case nor take any part in deciding it.

BANK *v.* PARTEE.

A., a married woman, offered to pay one-half of her indebtedness in land in B. County, Mississippi, at $10 per acre, and give her notes secured by mortgage on her land in C. County, in that State, for the remainder. A large number of her creditors having accepted the offer, she conveyed her land to D. in trust, but provided in the deed that if any of them should fail within ninety days from its date "to signify in writing their acceptance of the terms of settlement and payment of their claims or debts," they should "be considered as refusing the same," and be debarred from the benefits of the deed. Among

the creditors accepting the offer was E., who surrendered the notes held by him and took the new ones. After the ninety days had expired, A. expressed her hope that all her creditors would come in, and authorized her agent, in case they did, to receive her old notes and deliver the new ones in exchange therefor. At the time of said offer, A. represented that the land was incumbered only by a small annuity, and concealed the fact that a judgment by default had been obtained in C. County by F. against her and her husband. On execution sued out on that judgment, G., her son, and said F. purchased her land in that county. E. thereupon filed his bill to set the judgment aside, or to obtain leave to redeem the land. *Held*, 1. That E. having acted in pursuance of the original offer of A., the condition in her deed as to a written acceptance within ninety days did not apply to him. 2. That the condition being only in the nature of a penalty against the creditors, not assenting in the prescribed way, could be, and in fact was, waived by A. 3. That — following the decisions of the Supreme Court of Mississippi on the code of that State — unless a married woman has a separate estate there situate, she is, as to her contracts, subject to the disability of coverture, and that a creditor suing her there must aver in his bill or declaration that she has such an estate, and that his debt is a charge upon it, or ought to be paid out of it. 4. That, as the record of the judgment in satisfaction of which the land was sold does not disclose the fact that A. had such an estate, and that it was liable for her debts, the judgment was void. 5. That F. and G. were not innocent purchasers.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

Mr. William A. Maury for the appellants.

No counsel appeared for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

In July, 1866, the defendant, Sarah D. Partee, wife of William B. Partee, then a resident of Mississippi, being indebted in the sum of $125,000, and unable to pay the amount, submitted to her creditors a proposition in writing for settlement. She represented that the late war had caused her a loss of over $300,000, leaving her indebted as mentioned, with no resources except lands, which would not then sell for half of their value, or for half of her indebtedness. In order, therefore, to place all her creditors on the same footing, some of them having brought suits for sums amounting to about $14,000, she offered to pay one-half of her indebtedness in lands in Tallahatchie and Sunflower counties, Mississippi, at $10 per acre; and, for the remaining half, to give her notes in equal sums, payable in January, 1867, 1868, 1869, 1870, and 1871, with

interest at eight per cent per annum, secured by a mortgage on the residue of her lands in Yazoo County, then under cultivation. This proposal was afterwards modified so as to postpone for one year the maturity of the several notes.

To secure confidence in the papers to be drawn to close the transaction, she selected gentlemen well known in Yazoo City to see to a proper execution of a deed of trust, and to act as trustees, or to select proper persons for that position. And she stated that Messrs. Hyams and Jonas, lawyers of high character in New Orleans, would attend to any of the business which the creditors might choose to place in their hands, and to the distribution of the new notes after they were executed. Accordingly, in November, 1866, a deed was executed by Mrs. Partee and her husband to one Robert Bowman, conveying to him the lands mentioned, upon the following trusts: 1st, to hold the lands in Tallahatchie and Sunflower Counties for the benefit of such creditors as should accept the same at $10 an acre in payment of one-half of her indebtedness to them, or if a majority of the creditors should desire it, to sell the same and divide the proceeds, or to convey to each of such creditors his proportion of the lands; and, 2d, in case of default in the payment at maturity of the notes executed upon the settlement, to sell the lands lying in Yazoo County, or so much as might be necessary to pay them, and apply the proceeds to their payment.

The deed contained a clause providing that if any of the creditors should fail within ninety days from its date "to signify in writing their acceptance of the terms of settlement and payment of their claims or debts," they should "be considered as refusing the same," and be debarred from the benefits of the deed.

The instrument was properly executed, stamped, and registered. After its registration, it was delivered with the new notes, signed by Mrs. Partee and her husband, to Messrs. Hyams and Jonas, for the purpose of carrying out the proposed settlement and securing the acceptance of its terms. Many of the creditors had previously assented to its terms, and after the deed was executed they surrendered their old notes for the new notes. Other creditors came in afterwards, and in a simi

lar way gave up their old notes and took the new paper. It does not appear, however, that any of them signified in writing their acceptance of the terms of the settlement within the ninety days mentioned in the deed.

It appears, also, that before the deed was executed, namely, in April, 1866, one James Stewart had brought suit against Mrs. Partee and her husband on a promissory note made by her, and in June following had obtained judgment by default against them for a sum exceeding $6,000. Upon this judgment execution was issued, and in January, 1869, the lands in Yazoo County embraced by the trust-deed were sold and purchased by Stewart and a son of Mrs. Partee. When the settlement was proposed, the existence of this judgment was concealed from Messrs. Hyams and Jonas, who acted, as already stated, for Mrs. Partee in securing the assent of creditors. The representation then made was that the lands were incumbered only by a small annuity.

The present suit is brought to set aside this judgment of Stewart, or to obtain leave to redeem the land sold under it; to remove the trustee, who is charged with certain fraudulent practices in connection with the trust property, and to have a new trustee appointed; and to enforce the trusts of the deed. It is unnecessary for the disposition of the present appeal to state in detail the various allegations of the bill or of the several answers of the defendants, as the case appears to have been decided upon the supposed impediment to the relief prayed by reason of the provision excluding creditors from the benefits of the deed, who failed, within ninety days from its date, to indicate in writing their acceptance of the terms of settlement; and by the sale of the property in Yazoo County under the judgment of Stewart. Our consideration is limited, therefore, to the effect of that provision upon the rights of the complainants, and to the validity of that judgment.

1. With reference to the provision, it is to be observed that it was not mentioned in the proposition for settlement made in July, 1866. That prescribed no period within which its terms should be accepted; and before the execution of the deed, as already stated, and as recited in it, many of the creditors had assented to them. To such creditors — and they embrace the

complainants in this suit — the provision could not have been intended to apply. No purpose could have been subserved in requiring from them any further expression of assent to the settlement. As to them nothing further was necessary to complete the transaction than the surrender of the old notes and the acceptance of the new notes in their place; and this, as stated, was done.

As to the creditors who had not then acceded to the proposed settlement, it was important to fix some period within which they should come in. To quicken their action the provision was inserted. Their acceptance in writing was not a condition precedent to the vesting of the property in the trustee for their benefit, nor was it a condition upon which the trust was to be executed. It was at best only a condition subsequent in the nature of a penalty against creditors not assenting in the prescribed way, and could be waived by the grantors; and was in fact waived by them. Long after the lapse of the period prescribed they expressed to their agents a hope that all the creditors would come in; and they authorized them to receive from creditors their old notes and to deliver in exchange new notes in their place for one-half of their amount; and when this was done they permitted the creditors to repose upon the new security furnished until the Statute of Limitations had barred a right of action upon the old notes, without any suggestion that the deed was inoperative because of their failure to accept in writing the terms of the proposed settlement within ninety days. Their approval of, or at least acquiescence in, the conduct of their agents estops them in equity from enforcing the provision as to the acceptance in writing, so as to debar from the benefits of the deed any of the creditors who accepted the settlement by surrendering the old notes and taking the new ones. A married woman cannot be permitted, any more than an unmarried one, to retain the benefits of a transaction which she has solicited, and at the same time to disavow it. She cannot in this case retain the surrendered notes and repudiate the consideration upon which their surrender was made. 2 Story, Eq., sect. 1536.

2. As to the Stewart judgment, it is to be observed that the record shows it was rendered in an ordinary action of assumpsit

upon a promissory note of Mrs. Partee, without mention in the pleadings of any separate property belonging to her, or, indeed, of her being a married woman. The plaintiff Stewart knew that she was not a *feme sole*, and therefore neither he nor her son, who were the purchasers under the judgment, can claim any advantage from the omission. The judgment is simply a personal one; and a judgment of that character against a married woman is a nullity under the laws of Mississippi.

At common law, a married woman is incapable, except in a few special cases, of contracting a personal obligation. Her disability in this respect, by reason of her coverture, cannot be overcome by any form of acknowledgment or mode of execution, or by her uniting with her husband in the contract. The special cases in which the disability does not exist are those where she is compelled from necessity to act as a *feme sole*, as when her husband is imprisoned for life or for years, or has fled the country or been exiled. In such cases the husband is considered as civilly dead, and the wife as in a state of widowhood. Her disability also ceases when she is permitted to act as a sole trader, as in England by the custom of London; and in this country by special legislation. Equity, too, will sometimes impose as a charge upon her separate estate a debt incurred by her for its benefit, or for her benefit on its credit; but this is a different matter from a contract by which a personal obligation is created. Except in the cases mentioned, the general rule is that she cannot be personally bound; nor can she be subjected on her contract to a personal judgment. Various reasons are assigned for this latter exemption, some of which would be destitute of force under our altered laws. Reeves, in his treatise on Baron and Feme, says, "that no action at law can be maintained against her, for the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern." "And for the same reason," he adds, "there can be no personal decree against her in chancery. It must be one which reaches her property only." p. 171. This doctrine, whatever reasons may be assigned for it, has, with few exceptions, been recognized in the several States; and, in many

instances, personal judgments against married women upon their contracts, rendered upon defaults or by confession, have been held void. *Griffith* v. *Clark*, 18 Ind. 457; *Morse* v. *Toppan*, 3 Gray (Mass.), 411; *Dorrance* v. *Scott and Wife*, 3 Whart. 309. See also *Wallace* v. *Rippon and Wife*, 2 Bay (S. C.). 112, and *Norton* v. *Meader*, 4 Sawyer, 620–624.

The doctrine of the common law has, however, been greatly modified in most of the States by legislation, and the extent to which a married woman may contract, and the manner in which her contracts shall be authenticated and enforced, are definitely prescribed. In Mississippi such modification has been made. The Code of 1857 enacted that the property owned by a woman at the time of her marriage, or which shall subsequently come to her, shall be her separate property, and not be subject to the debts of her husband, but shall be liable for her own debts contracted before marriage. At the same time, it authorized a married woman, either by herself or conjointly with her husband, to contract with reference to her separate property, for its lease, use, and improvement, and the construction of buildings upon it; also, for the support of herself and children, and for many other things; and provided that such contracts shall be binding on her, and that satisfaction for them may be had out of her separate property. It also declared that, in addition to the remedies then existing by the common law by and against married women, "the husband and wife may sue jointly, or if the husband will not join her, she may sue alone for the recovery of her property or rights, and she may be sued jointly with her husband on all contracts or other matters for which her individual property is liable; and if the same be against husband and wife, no judgment shall be rendered against her unless the liability of her separate property be first established." Code of 1857, p. 335.

In several cases which have arisen under these provisions, it has been held by the Supreme Court of Mississippi that unless a married woman has a separate estate she is subject, as to her contracts, to the disability of coverture, and that a creditor suing her must, in his bill in equity or declaration at law, aver that she has such an estate, and that the debt is a charge upon it or ought to be paid out of it. It was so held in *Choppin*

v. *Harmon*, decided in 1872, when the court added that every suit in the State, whether in law or in equity, founded upon her contracts, "takes the shape and direction of reaching a specific fund." 46 Miss. 307. And in *Bank of Louisiana* v. *Williams and Wife* (46 id. 629), decided in the same year, the court said, speaking of a suit against a married woman, "The condition precedent to a right of recovery, either at law or in equity, is that there be a separate estate out of which satisfaction may be had. Our jurisprudence does not realize the possibility of a personal judgment against a married woman." In *Casey* v. *Dixon* (51 id. 598), decided in 1875, a personal judgment was rendered against a married woman and her husband, and her land sold under execution issued upon the judgment. The purchaser at the sale brought ejectment for the premises. It was held that the judgment was void and the sale under it invalid; the court saying, citing language used in a previous case not then reported, that in order to authorize a judgment against a married woman, her liability must be shown by averment and established by evidence; that a married woman is incapable of being bound either by contract or judgment, except in the special cases authorized by law; and that by the code of the State, if the suit is against her and her husband, no judgment can be rendered against her, "unless the liability of her separate property be first established."

In *Mallet* v. *Parham* (52 id. 921), also decided in 1875, the court, speaking of the power of a married woman to contract for supplies for her plantation, said: "It is only in consequence of the existence of her separate estate that the statute authorizes her to make the contract, and that the separate estate alone is bound by the contract. The enforcement of the contract is in the nature of a proceeding *in rem*. No general judgment can be rendered against her so as to reach on execution any other property."

There are other adjudications of the Supreme Court of Mississippi to the same purport. Those cited are sufficient to establish the invalidity of the Stewart judgment. The allegation essential under those decisions in every suit against a married woman, that she has separate property which is liable for the debts alleged, is wanting in its record. That discloses

no ground of action upon which a personal judgment can be rendered against her under the law of the State. The coverture of Mrs. Partee at the time the judgment was rendered is averred in the bill and is admitted. That fact going to the jurisdiction of the court could be shown by competent proof. There was no question of innocent purchasers without notice in the case, the judgment creditor and the son of Mrs. Partee being the purchasers.

The decree of the court below must be reversed, and the cause remanded for further proceedings; and it is

So ordered.

MR. JUSTICE MILLER dissenting.

I dissent from the judgment of the court in this case, and especially from that part of the opinion which holds that the judgment against Mrs. Partee and her husband, under which the land in question was sold, was absolutely void.

It is to be remembered that the question is not whether such a judgment would be held erroneous on an appeal from that judgment, but whether it can be held absolutely void when assailed collaterally in another action, where it is relied upon as the foundation of a title based on a sale under execution issued on the judgment.

Mrs. Partee was sued jointly with her husband. Both by the common law and by the law of all the States, a married woman could sue or be sued by joining her husband with her. The statutes of Mississippi, where this judgment was rendered, largely increased the liability of married women to be sued beyond what it was at common law. It made her liable, out of her separate estate, for supplies to the farm owned or cultivated by her, for any debt contracted with reference to her own property, whether the contract was made with the consent of her husband or not. In the case in which the judgment is held void, she signed a joint note with her husband, her name being signed before his; and she was sued with him on that note, and personally served with process. She has never denied the validity of that judgment, or sought to set it aside or vacate its force. Other persons, not parties to that suit, now come into court and say that all that was done was void because it

does not appear affirmatively, by the record, that the note on which the suit was brought was a contract concerning her private property. That was a matter which, if it were true, should have been pleaded as a defence. She was subject personally to the jurisdiction of the court. Her contracts were subjects of which the court had jurisdiction. It had jurisdiction to enforce those contracts by sale of her individual property. The note on which she was sued had every indication that it was her individual contract, as it no doubt was, and that her husband's name was placed there to show his consent.

To hold that persons not interested in that contract, nor parties to the suit, can now come in and treat the judgment as absolutely void, on its face, is such a departure from all the principles on which the jurisdiction of the court is determined, that even the authority of the courts of Mississippi should not, in my opinion, control us in the matter.

SAGE v. CENTRAL RAILROAD COMPANY.

1. In the mortgage of a railroad it was covenanted and agreed by all the parties thereto, that, in case of a foreclosure sale of the mortgaged property under a decree, the trustee named in the mortgage should, on the written request of the holders of a majority of the then outstanding bonds thereby secured, purchase the property at such sale for the use and benefit of the holders of such bonds, and that the right and title thereto should vest in him, no holder to have any claim to the proceeds except his *pro rata* share thereof, as represented in a new company or corporation, to be formed for their use and benefit; and that the trustee might take such lawful measures to organize a new company for their benefit, upon such terms, conditions, and limitations as the holders of a majority of the bonds should in writing request or direct, and he should thereupon reconvey the premises so purchased to such new company. On default of payment a suit was brought by the trustee against the mortgagor and subsequent mortgagees, praying for a foreclosure of the first mortgage, and for general relief. *Held*, 1. That such an agreement inures equally to the benefit of such bondholders, and that each holds his interest subject to the controlling power given to the majority of them. 2. That the trustee, the *cestui que trust*, and the trust itself being before the court, and it appearing that the holders of a majority of the bonds had in writing requested and directed the trustee, if he became the purchaser of the prop

erty, to convey it to a new corporation, the court might authorize and direct him to bid at the sale at least the amount of the principal and interest of the first-mortgage bonds, and might provide for a complete execution of the trust. 3. That though the specific relief sought was a strict foreclosure, a decree for a sale of the property and for the enforcement of the agreement contained in the deed was, under the prayer for general relief, appropriate. 4. That it was not error for the court to require that if a person other than the trustee became the purchaser at the sale he should pay at once, in cash, a part of his bid as earnest money. 5. That where some of the first-mortgage bondholders were permitted to intervene as parties to prosecute, for the protection of their several interests, an appeal from the decree for a sale of the property, and the appeal not having been made a *supersedeas*, the decree was executed, they cannot object to orders made prior to the decree, nor assign for error any part of it which is not injurious to their interests.

3 Where the decree required notice of the sale of the property to be advertised in certain newspapers, among which was A., printed in a certain city, and it appearing that, before such advertisement was made, A. had been merged into B., or that its name had been changed to B., — *Held*, that the identity of the paper remaining, the advertisement in B. was a substantial compliance with the order.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter and *Mr. N. A. Cowdrey* for the appellants.

Mr. Herbert B. Turner, *Mr. C. C. Cole*, and *Mr. R. L. Ashhurst*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

This proceeding was commenced by a bill filed at the suit of Charles Alexander and others, holders of bonds secured by a first mortgage or deed of trust of the Central Railroad Company of Iowa, praying for an account, for the appointment of a receiver, and for a foreclosure of the mortgage. The bill was filed to October Term, 1874, in the Circuit Court. It made the railroad company, and the Farmers' Loan and Trust Company of New York, who were the trustees named in the mortgage, parties defendant. Subsequently, at the same term, the trustees, who were also trustees under second and third mortgages, filed their original bill, as well for the benefit of the complainants in the first bill as for all other bondholders, praying also for an account, for a receiver, and for a foreclosure.

By order of the court, these two bills were consolidated, and the hearing of the case proceeded until the 22d of October, 1875, when a final decree was made, directing, *inter alia*, a sale of the mortgaged premises. On the 15th of January, 1876, Russell Sage, James Buell, and N. A. Cowdrey, on their petition, representing themselves to be holders of some of the mortgaged bonds secured by the first mortgage, were permitted to intervene as parties, to prosecute an appeal to this court, for the protection of their several interests, against the decree of Oct. 22, 1875. They have accordingly appealed; and as their appeal was not made a *supersedeas*, and the decree was executed by a sale, they have entered a second appeal from the confirmation of that sale.

Directing our attention first to the appeal from the decree of Oct. 22, 1875, it is observable that it raises no question respecting the validity or amount of the debts due by the mortgagors and secured by the several mortgages, nor any respecting the order in which they are entitled to payment. There is some complaint that the court, before the final decree was entered, directed certain payments to be made by the receiver for locomotives and rent of cars used upon the road, either by the receiver or before his appointment. Whether these orders were correct or not, we will consider hereafter. The appellants do not complain that the decree of the court has not determined correctly the amounts due upon the several mortgages, and marshalled them in their proper order of priority. Nor do they insist that it was not proper for the court, in view of the facts as they appeared, to order a sale of the mortgaged property. Their complaint is rather respecting the disposition which the court decreed to be made of the property, in case the trustees of the mortgage should become the purchasers. To understand those dispositions, and the reasons why they were ordered, it is necessary to observe carefully the provisions of the deed upon which the bill was founded, and which, therefore, properly affected the decree. Some of them are quite peculiar. The first mortgage was given to the Farmers' Loan and Trust Company of New York, to secure the payment of bonds of the railroad company to the amount of $3,776,000, with interest thereon. It covered the entire corporate property of the mort-

gagor, constructed or to be constructed, and all its franchises and privileges, — all its property that might thereafter be acquired, including machinery, locomotives, rolling-stock, tools, and supplies, as well as the net income of the mortgagor. It contained also the usual stipulation made in railroad mortgages, that in case of default in the payment of interest the principal should fall due; that the trustee, on the written request of a majority of the holders of the bonds, should be authorized and empowered to take possession of the property, and sell it at public auction. It is unnecessary to refer to the other provisions, except the following, which are special and unusual, and have a material bearing upon the decree of which the appellants complain. These we quote at large: —

"And it is further covenanted and agreed by and between the parties hereto, that in case of any judicial foreclosure sale, or other sale of the premises embraced in this mortgage, under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request the said trustee or their successor, they are authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds secured by this mortgage. And having so purchased said premises, the right and title thereto shall vest in said trustees, and no bondholder shall have any claim to the premises or the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation to be formed for the use and benefit of the holders of the bonds secured hereby, and the said trustee may take such lawful measures as deemed for the interest of said bondholders, to organize a new company or corporation for the benefit of the holders of the bonds secured by this mortgage. Said new company or corporation shall be organized upon such terms, conditions, and limitations, and in such a manner, as the holders of a majority of said outstanding bonds secured by this mortgage shall, in writing, request or direct, and said trustee so purchasing shall thereupon reconvey the premises so purchased by them to said new company or corporation."

It was a mortgage containing these stipulations that the Circuit Court was called upon to enforce. And the several

bondholders claiming under the mortgage held their interests subject to this controlling power given to the majority of all the holders.

There were two subsequent mortgages of the same property, given by the railroad company to the same trustee, to secure the payment of other bonds. These were set forth in the bill; and when the consolidated case was ripe for a decree, it appeared that there was due from the company for principal and interest of the first-mortgage debt the sum of $4,623,334.99 in gold, with interest from Oct. 15, 1875; upon the second mortgage, $1,136,246.86; and that there were $420,000 of bonds, secured by the third mortgage, outstanding. The court therefore decreed that the mortgagors should pay within ten days the sum due to the bondholders under the first mortgage; and if they failed to pay, that the mortgagees under the second and third mortgages and the judgment creditors, or any of them, in the order of their respective liens, should pay the same; and that in default of said payment by any of said parties, their equity of redemption in the premises should be foreclosed.

Had this been all, the result would have been a strict foreclosure. The master to whom the case had been referred had found and reported that the property would not sell at the date of his report (Oct. 11, 1875) for more than forty cents on the dollar of its indebtedness, and this report had been confirmed. It was therefore manifest that neither the railroad company nor any of the lien creditors subsequent to those holding under the first mortgage could or would pay the $4,620,334.99 thereby secured. But a strict foreclosure was undesirable for all the parties. Not only would it have cut off entirely the bondholders secured by the second and third mortgages, whose interests were before the court, and which it was bound to protect as far as possible, but it would have made the large number of bond holders under the first mortgage practically tenants in common of the railroad property. The inconveniences of such a result are obvious enough. A sale, therefore, was for the interest of all, and to that no one objected. Indeed, it was contemplated as possible in each of the three mortgages. The bondholders, through their trustee, had made arrangements in view of such a contingency. They had agreed what should be the effect and

consequence of a judicial sale. All of them had taken their bonds with knowledge of the agreement and subject to it. What that agreement was, what purpose it was intended to subserve, against what mischief it was proposed to guard, and by what mode it was stipulated the object intended should be accomplished, it is very important to consider. By the agreement, the entire body of the bondholders consented to place their interests, to a certain extent, under the control of a majority of their number. Their trustee was authorized to purchase the property at the judicial sale, should one be ordered, and convey it to a new corporation, to be formed for their benefit, provided a majority of them should, in writing, request such a purchase. They had agreed to more than this. They had consented that the new corporation should be organized upon such terms, conditions, and limitations, and in such manner, as the holders of a majority of the outstanding bonds secured by the mortgage should, in writing, request or direct. This consent and agreement, this deposit of power in the majority, was contained in the mortgage under which the appellants claim.

The purposes sought to be accomplished by it are manifest.

First, It was designed for protection against the perils of a forced sale of an unsalable property for cash. It was well known that at judicial sales of railroads for cash there is little likelihood of obtaining a bid for a sum at all commensurate with the value of the property sold, or with the amount of incumbrances upon it. The amount required is so large usually, that it is beyond the reach of ordinary purchasers. In such a case as the present, the first-mortgage bondholders are the only party that can become the purchasers, and they only, because they need not pay their bid in cash.

Secondly, The agreement looked farther. It provided for the contingency of a purchase by bondholders under the mortgage. But such a purchase could not inure equally to the benefit of all, unless all were parties to it. There is almost a certainty that in foreclosure sales of a railroad, especially when the mortgage debts exceed the market value of the property, as in this case, the purchaser will be an association of some of the bondholders secured by the mortgage, who buy with the intention of organizing a new company to hold the property for their

interests. Where the bondholders are numerous, diversities of views respecting the new organization may be expected, and they generally arise. Very rarely do all the bondholders unite in making the purchase. Frequently there is more than one combination, and a strife between them to secure the advantage hoped for from the purchase and consequent control of the property. The result is that those who do not belong to the successful combination are excluded from those advantages, and are not placed upon an equal footing with the others.

Thirdly, Another evil, that observation shows to be very frequent, is that the arrangements for purchasing the mortgaged property and organizing a new company, desired by the majority of the bondholders, and which would be for the equal benefit of all, are resisted by a small minority, unless they, the minority, are paid in full, or superior advantages are conceded to them, at the expense of their fellows.

It was in view of all this that the first-mortgage bondholders entered into the agreements contained in the mortgage, — the agreements which we have quoted. They provided that there should be no judicial sale for cash, unless the amount bidden at the sale should equal the sum due and secured by the mortgage. Instead of such a sale they provided a method by which all the bondholders with equal rights might effect a reorganization of the indebted corporation, and become the owners of the franchises and property mortgaged. This mode was the creation of a new corporation in which the property should be vested, for the equal benefit of all the holders of the bonds, thus preventing any minority or any bondholders from demanding that their wishes and interests should be given a preference to those of others in like condition, or that they should be paid in whole, or in part, in cash. So the agreement was in part intended to guard against the evils resulting from the want of unanimity among those whose rights were exactly the same, and the possible necessity of raising money to pay off non-assenting holders of the bonds. It was to secure the common interests of all the bondholders, in such a manner that none should obtain an advantage over the others, that it was agreed the purchase might be made by the trustee on account of all, and that the subsequent disposition of the subject of the pur-

chase should be for the common benefit of all. To carry out these intentions a majority of the bondholders was empowered to act controllingly for the entire body, in matters respecting the purchase and disposition of the property purchased, subject to the limitation that the purchase, if made by the trustee, should be for the use and benefit of the outstanding bonds; that the property should be conveyed to a new company which should be organized for their benefit, on such terms, conditions, and limitations as the holders of a majority of the outstanding bonds should request or direct. The agreement, though unusual, was a reasonable one. While it prevented a small minority of the bondholders from forcing unreasonable and inequitable concessions from the majority, it did not empower that majority to crush out the rights of the minority, or subject them to any disadvantage. It authorized only such arrangements as would inure equally to the benefit alike of the majority and the minority.

Such was the contract and such the power conferred upon a majority of the bondholders. It was such a contract which the bills brought before the Circuit Court for a decree. In view of its provisions we cannot think it was error to decree, as the court did, that the mortgaged property should be sold to the highest and best bidder, and that the trustee should be authorized and directed to bid at the sale, as trustee for the first-mortgage bondholders, at least the amount of principal and interest of the first-mortgage bonds.

The decree went farther. At the time when it was made it appeared that a large majority of the first-mortgage bondholders had, in writing, requested and directed the trustee, if becoming the purchaser, to convey the property to a new corporation, organized substantially on the terms, conditions, and limitations prescribed in the decree which the court made. The request was an attempted exercise of the power conferred upon that majority by the mortgage. The trustee, the *cestui que trust*, and the trust itself were before the court, and the court undertook a complete execution of the trust. It decreed as follows: —

"That if said trustee, as aforesaid, shall become the purchaser of said property at such sale, the title shall pass abso-

lutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second, and third mortgage bondholders, creditors and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage, and of this decree, and to be approved by a majority of said first-mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first-mortgage bondholders in such manner as the majority of such first-mortgage bondholders shall indicate and provide, and in which the second-mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second-mortgage bonds; and in which corporation the third-mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation."

Against this part of the decree the appellants present several objections. They urge that it was unauthorized by the prayer in the bill of complaint, and was not responsive thereto. It is true the bill contained no specific prayer for such directions; but beyond the relief specifically asked the complainants prayed for such other and further relief as the nature of the case should require, and as might seem meet to the court. The specific relief sought was a strict foreclosure; but under the prayer for general relief it is not questioned that the decree for a sale was appropriate. And as the deed of trust was made a part of the bill, and provided what should be done in case the trustee became the purchaser at the sale, it does not appear to be going outside of the case to enforce the agreement contained in the deed, into which the railroad company, the trustee, and, through the trustee, all the bondholders had entered.

A second objection is that in this part of the decree the court attempted to force inconsistent duties and trusts upon the trustee, different from those the parties had established by

contract under seal, viz. by the mortgage deed. The meaning of this is, as we understand it, that the decree directs a disposition of the property variant from the one stipulated for in the deed of trust. At first sight this objection seems to be not without merit. But after a careful examination of the deed, bearing in mind also the purposes sought to be accomplished by it, the mode prescribed for the accomplishment of those purposes, the powers vested in the majority of the bondholders, and the subordination of the trustee to those powers, we are unable to say that the decree was unwarranted. We cannot say that the majority transgressed the power they possessed, in their arrangement for the organization of the new company, and, consequently, that the decree of the court carrying out that arrangement directed a disposition of the property different from that to which all the bondholders had assented. The primary object of the deed was to secure to the bondholders a prior right to the entire property, — the subject of the trust, — so far as it was needed for the full payment of the bonds. The decree preserves this right in all its entirety. It directs that in the new corporation to which the trustee is ordered to convey, the controlling interest and power of management shall be given to the first-mortgage bondholders in such manner as the majority of them shall indicate and provide. It subordinates to their rights all the interests of the second and third mortgagees, as well as those of the general creditors and the stockholders of the railroad company, foreclosing entirely the equity of that company.

The agreement in the deed of trust (a similar one being also in the second and third mortgages) contemplated a substantial reorganization. It was for this that the power was given to the majority of the bondholders. The power was coupled with a large discretion. The majority was authorized to define the "terms, conditions, and limitations" under which the new company should be organized. What those should be was thus left to the discretion of the donees of the power. "Terms, conditions, and limitations" are broad words. Let it be conceded that the new organization must be for the benefit of the holders of the first-mortgage bonds, how can we say it is not for the benefit of those holders that entirely subordinate inter-

ests are conceded to junior lien creditors and to the stockholders of the former corporation? How can we say that such a concession was beyond the discretion with which the agents of the bondholders, that is to say, the majority, were clothed? Such concessions are generally made in reorganizations of railroad companies, and they are regarded as beneficial to the joint lienholders. They prevent delay and expenditure arising out of litigation between creditors, which are sometimes almost ruinous, and they lessen the risk of redemptions. The majority were empowered to direct the terms and conditions under which the new corporation should exist, and hold the property conveyed to it, as well as the limitations within which it might act. It is not intended that the majority could postpone the rights of any minority of the bondholders to those of other creditors, or allow any interference with those rights. Nothing of the kind has been done. Under the agreement the appellants, as well as the other bondholders, had, in case of a purchase by the trustee, no claim to the property purchased or to the proceeds thereof, "except for their *pro rata* share of the proceeds as represented in a new company," to be formed in the manner, and upon such terms and conditions, and with such limitations, as a majority of their associates may direct.

Upon the whole, therefore, we think the decree of the court, in the particular we are now considering, is consistent with the agreement of the bondholders contained in the deed of trust, and, therefore, that this objection of the appellants should not be sustained.

We see no error in the decree, so far as it required any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once in cash a part of his bid, as earnest money. Such other purchaser, of course, must be a cash purchaser, at least to the extent of the sum due on the first mortgage. It was, therefore, no hardship to require an immediate payment by him of a part of his bid, and the order that he should make such payment was a protection against false or unreal bids. That the same requirement was not made of the trustee was very proper, for the reason that a purchase by the trustee required no payment of money, beyond a sum sufficient for costs, unless the bid

exceeded the sum due on the first mortgage, the purchase being made for the first-mortgage bondholders.

The appellants further object to certain orders made by the court for payment by the receiver to John S. Newberry *et al.*, to Isaac M. Cate *et al.*, to Mowery Car Company, and to Haskell, Barker, & Co., for rolling-stock, furnished under lease or otherwise, for the railroad. These orders were no part of the decree of Oct. 22, 1875. These orders were made prior to that time, when the appellants were not parties to the suit, except through their trustee. They did not intervene and become parties until after the decree of October 22 was made. Then they were permitted to become parties "so far as to prosecute, if they so elected, for the protection of their several interests therein, an appeal to the Supreme Court from the decree entered Oct. 22, 1875." They asked for nothing more. They prayed for no appeal from any prior orders, and certainly they cannot be permitted now to object to orders made prior to that decree, — orders from which they have not appealed. But if this was not so, it would be sufficient to say that the orders were not erroneous. They were within the rules we announced in *Fosdick* v. *Schall* (*supra*, p. 235), and it is sufficient to refer to that case for their justification.

The appellants further object that the eighth paragraph of the decree was erroneous. That paragraph is as follows: —

"*Eighth*, That the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property, or any property in the use of said railroad company, or any part thereof, by virtue of contracts, or cases whereby material, labor, or property has been furnished for or placed upon said defendant's road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties as the same may be established and declared hereafter by this court."

This order relates to the effect of the decree, and not to the effect of a sale made under it, as the appellants seem to think. It reserves certain rights claimed for further adjudication. It cannot well be understood without reference to the nature of the claims and their condition when the decree was made.

This appears in the report of the master, to which there was no exception in these particulars. The claims were judgments amounting in the aggregate to about $13,000, recovered against the railroad company for injuries to persons and property, and which were liens prior to the mortgages. From some of these appeals had been taken. There were also judgments inferior to the liens of the three mortgages, and other judgments not claimed to be liens at all, and there was a floating debt. It was impossible to determine definitely the extent of the rights of these various claimants, when the sale was ordered, and no one could have been injured by reserving them for subsequent adjudication. This objection, therefore, has no weight.

One other remains. The appellants assign for error that the decree is in one particular illegal, incongruous, and contradictory, in this: that while in the first paragraph the right of redemption is barred as to the railroad company, the defendant, the second and third mortgage bondholders, and the judgment creditors, it is given in the seventh paragraph to the second and third mortgage bondholders, the general creditors, and the stockholders of the defendant company, "thus apparently denying the right of redemption to the railroad company and to the judgment creditors." The assignment does not complain that a right of redemption was given to those to whom it was accorded. It rather complains that it was denied to the railroad company and to the judgment creditors. If such be the meaning of the decree, how can the appellants complain of it? To them it works no injury, and those who might complain have not appealed. Besides, if the other portions of the decree are correct, as we have endeavored to show, redemption by anybody is, to say the least, extremely improbable, if not impossible. We cannot avoid the conviction that this assignment of error is not the assertion of a real grievance.

The appellants are the holders of about six per cent of the first-mortgage bonds. They are endeavoring to overturn an arrangement agreed to by a large majority of the bondholders appointed by themselves to make an arrangement for the reorganization of the debtor company, — an arrangement sanctioned by the court, which does not lessen their security or postpone them to any other bondholders, but which preserves to its fullest

extent all the rights assured to them by the mortgage. They ought not to succeed without the most substantial reasons. We do not find such reasons in the record, and the decree of the Circuit Court is affirmed.

Of the second appeal, that taken from the decree of August 31, 1877, confirming the master's report of the sale, little need be said. The errors assigned to it are substantially the same as those we have considered in the former case, and held to be insufficient to justify a reversal of the decree of Oct. 22, 1875. There are two or three other objections, only one of which, however, requires any notice. The others are wholly without merit.

It is objected that the decree and order required notice of the sale to be advertised in a newspaper printed in the city of New York, called the "Financier," as well as in other newspapers; that the master did not advertise the sale in that newspaper, nor report his inability to find any such newspaper to this court, in which the former appeal was then pending, and therefore did not comply with the order of the court. At the time when the sale was made there was no *supersedeas* in existence, and before the sale was advertised it was represented and made to appear to the circuit judge that the "Financier" had been merged into the "Public," or that its name had been changed to the "Public." He therefore, on the 8th of January, 1877, ordered that the notice of sale be inserted in the "Public" with the same effect as if the name of the paper had not been changed, and he directed the order to be entered of record. The sale was thus accordingly advertised.

Now, whether the judge had authority to make such an order in a recess of the court, it is not worth the while to inquire, for if he had not, advertisement in the "Public" was a substantial compliance with the original order. If the name of "Financier" was merely changed, the identity of the newspaper remained, and the order was to advertise in that newspaper. And so if the "Financier" was merged into the "Public," its subscribers and readers, to whom the advertisement was addressed and required to be addressed, were reached by it, as they would have been had there been no merger or change of name. The purpose of the order to advertise in that newspaper was publicity, and to

reach those persons who saw the paper. That purpose was not defeated by a change of name or a union with another newspaper. This objection, therefore, is formal rather than substantial. The case requires nothing more.

Decree affirmed.

MR. JUSTICE CLIFFORD, MR. JUSTICE MILLER, and MR. JUSTICE HARLAN dissented.

HOGE *v.* RAILROAD COMPANY.

1. In 1856, the legislature of South Carolina incorporated the Air Line Railroad Company, with power to construct a road between certain points, and to equip, use, and enjoy the same, with all the rights, privileges, and immunities granted to a certain other company which had been incorporated in 1845 by an act exempting it from taxation for the period of thirty-six years, and from the operation of the provisions of the act of Dec. 17, 1841. The latter act declares "that it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." The act of 1856 also empowered the company to unite with any other, and consolidate their management, but contained no clause excepting, in express terms, the charter from the operation of the act of 1841. An amendment, passed in 1868, authorized it to adopt another corporate name, and it was consolidated with a corporation of Georgia under the name of the Atlanta and Richmond Air Line Railway Company. The Constitution of South Carolina of 1868 having required that the property of corporations then existing or thereafter created should be subject to taxation, the legislature imposed a tax on such property. A stockholder of the latter company alleging that it had acquired immunity from taxation for the same period as the company chartered in 1845, and that such immunity was beyond legislative control, brought suit to enjoin the collection of the tax. *Held*, 1. That as the act of 1856, granting the charter, did not expressly exempt it from the provisions of the act of 1841, they are applicable to it. 2. That the charter must be read as if it declared that the capital stock of the company and its real estate should be exempt from taxation for thirty-six years, unless the legislature should in the mean time withdraw the exemption. 3. That if an exemption from future legislative control had been originally acquired by the company, it ceased when the amendment to the charter was obtained in 1868.

2. The intention of the legislature to exempt the property of corporations from taxation must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. If a doubt arise, it must be solved in favor of the State.
3. *Tomlinson* v. *Jessup* (15 Wall. 454) referred to and qualified.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The Richmond and Danville Railroad Company, a stockholder in the Atlanta and Richmond Air Line Railway Company, filed its bill against the taxing officers of South Carolina to enjoin them from levying any State, county, or municipal taxes upon the property of the last-named company within that State. The court below granted the prayer of the bill, and the taxing officers brought this appeal. The remaining facts are stated in the opinion of the court.

Mr. Le Roy F. Youmans, Attorney-General of South Carolina, for the appellants.

The only ground upon which the claimed exemption is sought to be maintained is that the Air Line Railroad Company was by its charter invested with the rights, privileges, and immunities of the Greenville and Columbia Railroad Company, and that the latter is, for the first thirty-six years of its existence, exempted from taxation. The bill does not aver that the charter is in express terms excepted from the provisions of sect. 40 of the act of 1841, and they are, therefore, to all intents and purposes, as much a part of it and of any amendment thereof as if they had been fully and at large incorporated therein. The power to revoke the charter as it originally existed or was subsequently modified having been thus reserved by positive enactment, all the chartered privileges, rights, and immunities of the Air Line Company were subjected to State control. *Tomlinson* v. *Jessup*, 15 Wall. 454. But had the bill set up a case resting on the allegation that the charter of the Air Line Company was virtually, although not in terms, excepted from that section, the appellants contend that to incorporate by implication such a provision into a charter is unwarranted. All grants of special powers or immunities are construed strictly against the grantees and in favor of the State. *Jackson* v. *Lamphire*, 3 Pet. 280; *Beaty* v. *The Lessee of Knowler*, 4 id. 108; *Provi-*

dence Bank v. *Billings & Pittman*, id. 514; *Charles River Bridge* v. *Warren Bridge*, 11 id. 420. And more especially where the taxing power is concerned, implications are never admitted to create or continue an exemption from its exercise; for "there is no subject over which it is of greater moment for the State to preserve its power than that of taxation." *Tomlinson* v. *Jessup*, *supra*.

Such exceptions are uniformly and emphatically restricted to clear and unambiguous grants in express words. *West Wisconsin Railway Co.* v. *Supervisors*, 93 U. S. 595. But by the provisions of that section the exception to its operation must be expressly declared in any subsequent act granting a charter, a renewal, an amendment, or a modification thereof. There is no such exception in the charter of the Air Line Company or in the amendment of 1868, and whatever exemption, if any, which that company may have originally had, does not inure to the consolidated company. *Morgan* v. *Louisiana*, id. 217.

Mr. Skipwith Wilmer and *Mr. William E. Earle*, *contra*.

The Air Line Railroad Company was incorporated in 1856, by a charter which invested it with all the rights, privileges, and immunities granted to the Greenville and Columbia Railroad Company, and was therefore, to the same extent as the latter company, exempted by an irrepealable law from taxation for the period of thirty-six years. *Humphrey* v. *Pegues*, 16 Wall. 244; *Tomlinson* v. *Branch*, 15 id. 460; *Philadelphia & Wilmington Railroad Co.* v. *Maryland*, 10 How. 376; *The State ex rel. Greenville & Columbia Railroad Co.* v. *Hood*, 15 Rich. (S. C.) 177.

The act of 1841 embraces only the charters to which the legislature thereafter granting them intends that it shall be applicable. By its existence on the statute-book, it becomes applicable, in the absence of any thing to the contrary; but if the legislature determines that it shall not, in a given case, be applied, no particular form of expression is required to exempt from its operation any subsequently granted charter. The question then is narrowed down to the intention of the legislature which granted the charter of the Air Line Company. If it intended to grant an irrevocable immunity from taxation for thirty-six years, and from the operation of the act of 1841,

the grant is valid. *New Jersey* v. *Yard*, 95 U. S. 104. Although it did not in express terms suspend that act, yet if by apt words it evinced an intention to do so, then no restrictions thereby imposed can defeat such intention.

The immunity, if conferred upon the Air Line Company, continued unimpaired not only up to the time of the authorized consolidation with the Georgia Company, but the consolidated company was entitled to it so far as the property in South Carolina was concerned. *Delaware Railroad Tax*, 18 Wall. 206; *Tomlinson* v. *Branch*, *supra*; *Central Railroad, &c. Co.* v. *Georgia*, 92 U. S. 665.

The distinction between a privilege granted in an amendment by which the grantor gains nothing and the grantee loses nothing, — a grant which is in the nature of a *nudum pactum*, — is marked and fully recognized in *Miller* v. *Wryman*, 3 Pick. (Mass.) 211. Where the exemption is granted as a part of the original act of incorporation, or by an amendment which requires new duties, the benefit to accrue to the State, as they are imposed on the grantee, constitutes a consideration which makes a binding contract that no subsequent legislation can impair. *Herrick* v. *Rutland*, 10 Vt. 530; *Sharpe* v. *Rutland & Burlington Railroad Co.*, 27 id. 146; *Wilmington Railroad Co.* v. *Reid*, 13 Wall. 264; *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Fletcher* v. *Peck*, 6 Cranch, 87.

The rule that a grant by a State of powers and special exemptions is construed most strictly against the grantee can never be strained to the extent of defeating the legislative will or revoking a contract.

MR. JUSTICE FIELD delivered the opinion of the court.

The Richmond and Danville Railroad Company, a corporation created under the laws of Virginia, is the owner of twenty-two thousand shares of the capital stock of the Atlanta and Richmond Air Line Railway Company, a corporation created under the laws of Georgia and South Carolina, and brings the present suit to enjoin the collection of taxes assessed upon its road and other real property in the latter State, alleging that they are exempt from taxation. Its claim to exemption arises in this wise: A company known as the Air Line Railroad Company in South

Carolina was incorporated in 1856 by the legislature of that State and authorized to construct a railroad between certain designated points, and to equip, use, and enjoy the same, "with all the rights, privileges, and immunities granted to the Greenville and Columbia Railroad Company under the act incorporating the same and the several acts amendatory thereof," so far as they were applicable. The company was also empowered to unite with any other railroad company and to consolidate their management, and, by an amendment to its charter, to adopt any other corporate name which it should deem best. In pursuance of this authority, it united in 1870 with a company incorporated under the laws of Georgia, known as the Georgia Air Line Railroad Company, and took the name of the Atlanta and Richmond Air Line Railway Company.

The Greenville and Columbia Railroad Company was incorporated in December, 1845, and, by a provision in its charter, the stock of the company and the real estate it might purchase, connected with or subservient to its works, were exempted from taxation for the period of thirty-six years. At the time of its incorporation there was a law of the State in force, enacted in 1841, establishing the principles on which charters of incorporation were thereafter to be granted, the forty-first section of which provides "that it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority."

The act incorporating the Greenville and Columbia Railroad Company excepted its charter in express terms from the operation of the act of 1841; but the act incorporating the Air Line Railroad Company in South Carolina made no such exception with respect to its charter. It is contended, however, that by the provision conferring the same rights, privileges, and immunities which the Greenville and Columbia

Railroad Company possessed, the Air Line Company not only acquired immunity from taxation for the same period, but that such immunity was placed beyond legislative repeal. The Constitution of the State, adopted in 1868, having required that the property of corporations then existing, or thereafter created, should be subject to taxation, except in certain cases, not applying here, subsequent legislation, passed in conformity with this requirement, imposed a tax upon the property of railroad companies, including that of the Atlanta and Richmond Air Line Railway Company, notwithstanding the exemption mentioned. The present suit was thereupon brought to enjoin its enforcement. The court below held that the property of the company was exempt from taxation for the period of thirty-six years from the date of its charter, and enjoined the officers of the State from collecting the tax assessed. From its decree the present appeal is taken.

By the law of 1841 every charter of a corporation in South Carolina subsequently granted, amended, or modified was subject to repeal, amendment, or modification by the legislature; unless specially excepted from such legislative control in the act granting the charter, amendment, or modification. Such is evidently the meaning of the forty-first section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson* v. *Jessup*, reported in 15th Wallace, and gives the legislature a more extended control. But it is the construction to which a more careful examination of the language has led us. By it the legislature said, that subsequent charters should be subject to repeal or amendment, unless they were in express terms excepted from its control in the acts granting them; and that existing charters, if subsequently amended or modified, should stand in the same position. Its provisions constituted the condition upon which every charter was afterwards granted, amended, or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it. They did not of course operate as a limitation upon the power of succeeding legislatures so as to control any repugnant legislation, but so long as they remained unrepealed, subsequent legislation, not repugnant in its terms, was to be

construed and enforced in accordance with them. *Railroad Company* v. *Maine*, 96 U. S. 499.

As the act incorporating the Air Line Company in South Carolina in 1856 contained no clause excepting its charter from the provisions of the law of 1841, they must be held applicable to it. To include in that charter an exemption from legislative control because such exemption was possessed by the Greenville and Columbia Company would be to thwart the declared will of the legislature, that such exemption should not exist, unless the act granting the charter excepted it *in express terms* from that law. Its charter must, therefore, be read as if it declared that its capital stock and the real property purchased by it and connected with or subservient to its works should be exempt from taxation for the period of thirty-six years, unless the legislature should in the mean time withdraw the exemption. Its stock and real property were thus exempted for that period from the general tax levied upon property of that kind, unless the legislature should specifically direct otherwise.

If it be assumed, however, that by the act incorporating the Air Line Company it acquired not only the immunity from taxation which the Greenville and Columbia Company possessed, but also its original exemption from future legislative control, this exemption ceased when the company obtained an amendment to its charter in September, 1868, before its consolidation with the Georgia Company. By that amendment the charter of the company was at once brought under the control of the legislature by virtue of the act of 1841, the act granting the amendment containing no clause excepting the charter from the provisions of that act.

In whichever way the legislation of the State may be viewed, the same result follows, — that the legislature of South Carolina was not inhibited from subjecting the property of the company to taxation, to restrain the collection of which this suit is brought.

The power of the legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its own existence, but so as to be beyond the control of the taxing power of succeeding

legislatures, has been asserted in several cases by this court, although against this doctrine there have been earnest protests by individual judges. But though this power is recognized, it is accompanied with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the legislature, it must be solved in favor of the State.

It follows that the decree of the court below must be reversed, and the cause be remanded with directions to dismiss the suit; and it is

So ordered.

DENVER v. ROANE.

1. A., B., and C., who were partners as attorneys and counsellors-at-law, agreed that the general partnership between them should terminate March 18, 1869; that thereafter no new business should be received by the firm, and that any coming to it through the mails should be equitably divided. It was also stipulated that the business then in hand should be closed up as rapidly as possible by them "as partners, under their original terms of association and in the firm name." They agreed, Aug. 13, 1869, that in case of the death of either of them, his heirs or personal representatives should receive one-third of the fees in cases nearly finished, and twenty-five per cent in other partnership cases. A. having died, his executor filed his bill against B. and C. for a discovery, and to recover A.'s share in the fees received by them out of the partnership business which remained unfinished when the firm was dissolved. *Held*, 1. That a court of chancery had jurisdiction to entertain the bill, and power to decree the relief asked so far as the fees had been collected. 2. That the partners having by the agreement of August 13 provided for the division of the fees in case of the death of either of them, the survivors were entitled to no allowance for winding up the business, other than their share of the fees as specified in said agreement.

2. Where an attorney-at-law refuses to act as a partner, or to perform the functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause.

APPEAL from the Supreme Court of the District of Columbia.
The facts are stated in the opinion of the court.

Mr. Albert Pike for the appellants.
Mr. Joseph H. Bradley and *Mr. S. S. Henkle, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

The bill filed in this case was not an ordinary bill for the settlement of partnership accounts. James Hughes, the complainant's testator, and James W. Denver and Charles F. Peck were in partnership as attorneys and counsellors-at-law from 1866 until the 18th of March, 1869. On that day it was agreed between them virtually that the general partnership should terminate; that thereafter no new business should be received in partnership, and that any coming to the firm through the mails should be equitably divided. The agreement, however, contained a stipulation that the business of the firm theretofore received and then in hand should be closed up as rapidly as possible by the members of the firm "as partners, under their original terms of association and in the firm name."

Soon after, on the 13th of August, 1869, a further agreement was made to the effect that in case of the death of any one of the partners, his heirs or personal representatives, or their duly authorized agent, should receive one-third of the fees in cases nearly finished, and twenty-five per cent in other partnership cases. Denver acceded to this second agreement, with the understanding that before any such division should be made, at any time, all partnership obligations should be first satisfied, proposing no new terms, only stating the legal effect. We think this was a closed contract.

It is upon these two agreements the bill is founded. Hughes died on the 21st of October, 1873, and Roane, the executor of his will, has brought the present suit for a discovery, and to recover from the surviving partners the share of the testator in the fees received by them out of the partnership business which remained unfinished when the general partnership was dissolved. A decree having been entered against the defendants in the court below, they have appealed to this court, and have assigned numerous errors. Of most of them it will be necessary to say but little, and, indeed, in regard to most of them there has

been hardly any controversy between the parties during the argument.

It is first insisted by the appellant that the court below had no competency or jurisdiction to entertain a bill for such relief as is prayed for, nor to give such a decree as the court gave, whereby it attempts to settle and close the affairs of a partnership by decreeing specific sums as legally due, and if so demandable at law, and providing for the further continuance of the partnership and collection by virtue of its decree of other like sums until the business of the partnership may end. Such is the first assignment of error. The objection misapprehends the nature of the case made by the bill, overlooks the facts, and does not state accurately the decree. That a bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an account, so far as an account is possible, and for a discovery of the partnership property which came to their hands, is undeniable, and such was the object of the present bill. When the firm was dissolved in March, 1869, for general purposes, the agreement of dissolution stipulated that, as to the business then in hand, the members of the firm should continue partners, and should close it up. What that business was, the present defendants only could know, after the death of Hughes, for it was then left in their hands, and they only could know what fees had been received on account of it. A bill for discovery, as well as for distribution of the fees received, was, therefore, plainly within the province of a court of equity. And as the partners had agreed, as they did by the agreement of August, 1869, to divide those fees in certain proportions, it was quite competent for the court to enforce fulfilment of the contract, so far as was possible when the decree was made. The court did not attempt to make a complete settlement of the affairs of the partnership. In the nature of the case that was impossible. Some of the partnership business remained unfinished, and fees uncertain in amount were yet to be collected. But so far as fees had been collected, the right to immediate distribution was complete. The agreement did not contemplate that all the fees collected might be held by the surviving partners until all the partnership business should be brought to an end, and it was, there-

fore, quite proper to reserve consideration of the fees yet to be received after they shall have been earned.

An objection raised by several other assignments of error (particularly the sixth, seventh, eighth, ninth, eighteenth, and nineteenth) is, in substance, that the court erred in applying to a partnership between lawyers and claim agents the principles of the law of commercial partnerships, in regard to the modes of settlement of the same after the death of a partner, and in regard to the neglect of the business of such a firm by a partner; that by the decree no compensation is allowed to the survivors for carrying on the unfinished business, but that they are required to continue it as well for themselves as for the benefit of the deceased partner's estate. We think these objections to the decree ought not to be sustained. We are not convinced that during his life Hughes (except perhaps in reference to a single case in charge of the firm) was guilty of such neglect, or violation of his duty to his partners, as should deprive him or his personal representative of a right to share in the profits of the partnership. In regard to the work done and the fees received after his death, the parties, by their agreements, prescribed the rule for determining their rights as against each other. Having jointly undertaken the business intrusted to the partnership, all the parties were under obligation to conduct it to the end. This duty they owed to the clients and to each other. And as to the unfinished business remaining with the firm on the eighteenth day of March, 1869, the duty continued. The agreement provided for that. Now, in reference to this duty the law is clear. "As there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it follows that he must do it without any rewards or compensation, unless there be an express stipulation for compensation." Story, Partn., sects. 182, 331; *Caldwell* v. *Leiber*, 7 Paige (N. Y.), 483. So it is held that where partnerships are equal, as was true in the present case, and there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation. *Brown* v. *McFarlam, Executor*, 41 Pa. St. 129; *Beatty* v.

Wray, 19 id. 516; *Johnson* v. *Hartshorne*, 52 N. Y. 173. This is the rule in regard to what are commonly called commercial partnerships, and the authorities cited refer to those. There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work and results of work after the death of any of their number. The agreement of Aug. 13, 1869, provided that in case of the death of any partner, one-third of the fees in cases nearly finished, and one-quarter of the fees in other partnership cases, should belong to the representatives of the decedent. Of course, it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement.

The most important objection to the decree which has been urged by the appellant is that it adjudged to the complainant one-third of the fee collected by the defendants in the case of Gazaway B. Lamar against the United States, including the claim of D. A. Martin. That case was in charge of the firm before the agreement of March 18, 1869, was made, and was commenced in 1868. It was, therefore, one of the cases within the purview of the agreement of Aug. 13, 1869. Hughes's name appeared on the record as attorney and counsel with the appellants for the claimant. But on the 9th of January, 1873, he came into court and asked that his name be erased as such attorney, and that he have leave to withdraw his appearance and sever his connection with the cause. His motion was allowed, and his appearance was then withdrawn. The appellants, however, went on with the case. Briefs were filed for the claimant on the 21st of March and the 22d of April, 1873, the case was argued on the 20th of May, and on the 2d of June next following the court entered a judgment for the claimant. An appeal was then taken to this court, which was subsequently dismissed. After the withdrawal of his appearance and the severance of his connection with the cause, Hughes took no

part in prosecuting the claim, neither in the Court of Claims nor in the Supreme Court, and he paid no attention to it. He quarrelled with Lamar, and about the time he withdrew from the cause he denounced the claim privately to one of the judges of the Court of Claims as altogether without merit and a fraudulent case, or words to that effect, and said that he had decided not to be involved in a case of so scandalous a character, and for so worthless or unworthy a client. In regard to the question of fees in the case, the judge testifies, "he declined to have any interest in the case, or to take fees, because he believed the case was a corrupt one, and not likely to succeed, and that he would not lose much by his withdrawal from the case."

The question presented by this state of facts is whether, inasmuch as the case was afterwards conducted by the appellants to final success, and they received a fee from Lamar, the claimant, Hughes would be entitled to any part of the fee were he now living. If not, certainly his personal representative cannot be now. The recovery of the claim was undertaken by the firm without any agreement respecting fees. By undertaking it the firm and each member of it assumed to conduct the case to a final conclusion, and with all fidelity to the client. Such was the contract of Hughes with Lamar, as completely as if he had been the sole attorney and counsel employed. And as the contract was entire, he could not have abandoned it after a partial performance, and still have held the other party bound. Much less could he have accompanied his abandonment by denouncing the honesty of the claim to one of the judges of the court whose province it was to find the facts and adjudicate upon its merits, and yet claim compensation for services rendered. Such conduct on his part was not merely a renunciation of his engagement to the client. It was a flagrant breach of professional duty. It was not in his power to refuse performance of his part of the implied contract with Lamar, take action hostile to the claim, and still hold Lamar bound. Certainly he could not hold Lamar directly liable. And we do not perceive that, in equity, his situation is any better because he had contracted with the client jointly with his copartners.

If, then, by abandoning the case and denouncing it as fraudulent, he lost all the right which he had against Lamar, how

can he claim from his copartners any of the compensation they obtained for conducting the case after his abandonment to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By the agreement of copartnership he had undertaken to share in the labor, and to promote the common interests of the firm, and that was the foundation of his right to share in its earnings. It may be that mere neglect of his duty would not have extinguished that right, but a repudiation of his obligations, refusing to act as a partner, or to perform the functions of a partner, is quite a different thing. It may well be considered as a repudiation of the partnership. It was said in *Wilson* v. *Johnstone* (16 Eq. Ca. Abr. 606), "He who acts so as to treat the articles as a nullity as it regards his own obligations, cannot complain if they are so treated for all purposes." It may, therefore, very justly be held that by his action Hughes became a stranger to the case, and repudiated any relation he had previously held to it as a partner in the firm. The partnership ceased as respects that claim. The other partners who continued to attend to the case could charge the client nothing for his services, for as the contract was contingent on success, nothing was due to any partner until success was attained. They certainly could claim nothing for services rendered by him after he severed his connection with the case, for he rendered none; and if he had any just claim on a *quantum meruit* for services rendered before, it was against Lamar, and not against his copartners.

We think, therefore, the decree of the court below was erroneous, in so far as it allowed to the complainant any part of the fee collected from Lamar or from Martin, who owned a part of what was recovered in the Lamar suit.

We discover no other fault in the decree, but for this the case must be sent back for correction.

The decree of the Supreme Court of the District will be reversed, and the record remitted with instructions to enter another decree in conformity with this opinion; and it is

So ordered.

BROOKLYN v. INSURANCE COMPANY.

1. Where the authorities of a town in Illinois, being thereunto empowered, subscribed in its behalf for stock in a railroad company, and issued its coupon bonds in payment therefor, the town, when sued by a *bona fide* purchaser for value of the coupons before maturity, cannot set up as a defence that the company disregarded its promise to construct the road, or that the town officers delivered the bonds in violation of special conditions not required by statute, and of which he had no knowledge or notice.
2. Where the bonds were signed by the town officers designated for that purpose by the charter of the company which authorized the issue of the bonds, after the requisite popular vote and the subscription, it is not necessary that the board of auditors or the other corporate authorities should participate in their issue and delivery.
3. Where a suit was brought by the town in the county court against the company and others, and a decree rendered that the bonds and coupons were null and void and should be surrendered for cancellation, — *Held*, that the decree bound the parties who were personally served with process or who appeared, and did not affect the other holders of the securities, who had only constructive notice of the suit.
4. In an action of debt, the jury were sworn to try "the issue." Two issues were joined, and the jury found "the issue" for the plaintiff, and assessed his damages. Judgment was rendered therefor. On a subsequent day of the term, the defendant moved the court to set aside the judgment and grant a new trial, but filed no reasons therefor, and thereafter failed to appear. The record presents no bill of exceptions showing to what point the evidence at the trial was directed. *Held*, that the denial of the motion furnished no ground for reversing the judgment.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought by the Ætna Life Insurance Company, a corporation of the State of Connecticut, against the town of Brooklyn, in the State of Illinois, upon certain interest coupons detached from bonds issued in the name of that town. Besides the general issue, the defendant filed four special pleas.

The second plea, in substance, avers that the coupons in suit and the bonds to which they were attached were issued and delivered by the supervisor and town clerk of the town for stock claimed to have been subscribed to the Chicago and Rock River Railroad Company, an Illinois corporation, organized under an act approved March 24, 1869, and thereby authorized and empowered to locate, construct, and complete a railroad from a point on the south side of Rock River, near Sterling, *via*

Amboy, crossing the Chicago and Burlington Railroad, thence to intersect the Chicago branch of the Illinois Central Railroad, outside of the corporation at Chicago; that the company, in order to induce the town to subscribe to its capital stock, pretended, by its officers and agents, to lay out the line of railroad through the town and near the village of Maluguis Grove, thence to its terminus on the Chicago branch of the Illinois Central Railroad, and gave out that it was about to construct and complete its road, and thereby establish a through line to Chicago, wholly independent of and a competing line with the Chicago, Burlington, and Quincy Railroad, which passes a few miles south of Brooklyn; that on 20th September, 1869, an election was held to determine whether the town should subscribe $50,000 to the stock of the company; that the notices for the election expressly stated that no bonds in payment of any subscription should be issued, draw interest, or be delivered to the company, until the railroad was completed and cars running through Brooklyn; that a majority of the voters at such election voted to make the subscription; that on 23d May, 1870, William Holdren, the acting supervisor of the town, signed and executed as such a certain paper, purporting to subscribe $50,000 in the name of the town to the capital stock of the company, which subscription provided that it was made upon the express understanding set forth in the notices of election, and that no payment was to be made until the road was completed and the cars running through the town; that the supervisor of the town had no authority or power to issue any bonds or coupons to the company until the road should be completed, which has never been done; that just before the issuing of the bonds and coupons it was rumored in the town that the railroad was about to be transferred to the Chicago, Burlington, and Quincy Railroad Company, and was not to be built and completed as required by the notices of election and the terms of subscription; that thereupon the agents and representatives of the Chicago and Rock River Railroad Company were notified that if the road was not to be built and completed as promised, the bonds and coupons would not be issued and delivered; whereupon said agents and representatives informed the town and the citizens thereof that the company intended to complete

the railroad as promised, and as fast as men and money could do so; that thereupon the supervisor and town clerk, relying upon such representations, but having no power or authority so to do, did, on or about Nov. 7, 1872, sign, issue, and deliver, in the name of the town, to the agents and representatives of the company, bonds to the aggregate amount of $50,000, with coupons attached, part of which are those sued on; that as soon as the bonds and coupons were received by the company it utterly ceased and refused to prosecute the construction of the road, and abandoned the entire work, whereby the town failed to obtain any railroad to Chicago, or a competing road with that of the Chicago, Burlington, and Quincy Railroad; that the representations aforesaid of the company's agents were knowingly false and fraudulent, but their falsity was unknown to the town, its supervisor, and clerk when the bonds were issued and delivered, and the issuing and delivery were procured by such false and fraudulent representations; that the bonds and coupons are wholly void and in no wise obligatory upon the town, because the company had not at the time they were issued complied with the conditions prescribed by the election notices and the subscription; that the town claims no interest in the stock of the company, which is worthless, and has been ever since the work was abandoned, and has received no value whatever for the bonds and coupons.

The third plea avers that the insurance company "is not a *bona fide* assignee of the interest coupons declared upon in said declaration, before maturity and without notice of the defences set up in the second plea."

The fourth plea avers that the bonds and coupons "were issued by the supervisor and town clerk of said town of Brooklyn, and delivered without the authority of the board of auditors or the corporate authorities of said town; and the supervisor of said town who issued and delivered the same acted therein fraudulently and in collusion with the parties to whom the same were delivered, the said supervisor knowing at the time he had no such authority, and he having been elected supervisor on the express pledge on his part, and with the understanding between him and those who voted for and supported him, that he would not issue and deliver said bonds and coupons

until said Chicago and Rock River Railroad was completed its entire length to the Chicago branch of the Illinois Central Railroad."

The fifth plea avers that by a decree of the Circuit Court of Lee County, Illinois, rendered Nov. 14, 1873, in the action of the town of Brooklyn and others against the Chicago and Rock River Railroad Company and others, "it was ordered, adjudged, and decreed that the said pretended bonds and coupons of the said town of Brooklyn, so issued to the said Chicago and Rock River Railroad Company, and registered as aforesaid in the office of the auditor of public accounts of Illinois, are void and in no wise obligatory on the said town of Brooklyn, and that the same be surrendered up by the parties holding the same to be cancelled," which decree it is averred is in full force and effect; that the said insurance company was made defendant in such suit with the other holders and owners of the bonds and coupons issued by the town, by the name and description of "the unknown owners of certain bonds and coupons issued by Washington J. Griffin, the supervisor of the town of Brooklyn, Lee County, Illinois, to the Chicago and Rock River Railroad Company, purporting to be the bonds and coupons of said town of Brooklyn;" that said Circuit Court of Lee County had then and there jurisdiction of the subject-matter and the persons or parties defendant therein, by the issuing and return of process, and by proof of publication made as required by the statute of the State of Illinois in case of non-resident defendants.

To the plea of the general issue a joinder was filed, and to the third plea a replication was filed, averring that the insurance company became a *bona fide* assignee of the coupons declared upon before maturity, and for value, without notice of the defences set forth. To the second, fourth, and fifth pleas there was a general demurrer.

Upon the calling of the case for trial, the plaintiff moved the court "that a jury come to try the issue joined upon the plea herein. It is thereupon considered by the court that a jury came to try said issue, and thereupon came a jury, &c., . . . who were . . . sworn, well and truly to try said issue, and after, &c., . . . returned into court the following verdict, to wit: 'We, the jury, find the issue for the plaintiff, and assess

its damages to the sum of $5,511.'" Judgment was thereupon rendered for the plaintiff. Upon a subsequent day of the term, the town, by its attorney, moved the court to set aside the judgment and grant a new trial, but filed no grounds therefor in writing. The town failing thereafter to appear and sustain its motion, the same was overruled and the judgment ordered to stand in full force. The town then sued out this writ of error.

The errors assigned are, that the court below erred, 1st, in sustaining the demurrers to the second, fourth, and fifth pleas; 2d, in rendering judgment on the verdict of the jury.

Mr. Milton T. Peters for the plaintiff in error.

A general demurrer should not be sustained to special pleas, setting up a substantial defence, though the matter of them might be given in evidence under the general issue. The objection can be reached only by a special demurrer, or a motion to strike them from the files. *Pendleton County* v. *Amy*, 13 Wall. 297.

It is the established ruling of this court that to preclude a municipal corporation from insisting that it is not liable to pay its bonds and coupons, issued without the precedent performance of the conditions prescribed by statute, its constituted authorities must not only have decided that such conditions had been performed, but their decision must appear in the recitals of such bonds. Otherwise purchasers are not protected, if the non-performance of such conditions be shown. *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Town of Vienna* v. *Murdock*, id. 494; *Marcy* v. *Township of Oswego*, id. 637; *Humboldt Township* v. *Long et al.*, id. 642; *Commissioners* v. *Bolles*, 94 id. 104; *Commissioners* v. *January*, id. 202; *Commissioners* v. *Clark*, id. 278; *County of Warren* v. *Marcy*, 97 id. 96.

If the pleadings on the part of the plaintiff do not aver such recitals, the estoppel does not arise. The plea setting up such non-performance is a valid defence to the action, where, as in this case, the plaintiff demurs instead of setting up in a replication such recitals by way of estoppel. *Pendleton County* v. *Amy*, *supra*. A want of authority to issue bonds is fatal to their validity, even though held by an innocent purchaser for value. They are void where the vote of the town

authorized their issue in a certain contingency which never occurred. *Township of East Oakland* v. *Skinner*, 94 U. S. 255; *Bissell* v. *City of Kankakee*, 64 Ill. 249; *Decker et al.* v. *Hughes et al.*, 68 Ill. 40; *Burr et al.* v. *City of Carbondale*, 76 id. 470; *Barnes* v. *The Town of Lacon*, 84 id. 461; *Middleport* v. *Ætna Life Insurance Co.*, 82 id. 568; *Supervisors of Jackson County* v. *Brush*, 77 id. 59; *People* v. *Dutcher*, 56 id. 149; Dillon, Mun. Corp. 524.

The foregoing decisions of the Supreme Court of Illinois establish that the issue by the supervisor and town clerk of bonds before the completion of the road having been expressly prohibited by the vote of the town, the subscription to the stock of the company was unauthorized, and that bonds issued in payment therefor are void. Those officers are not of themselves, in the constitutional sense of the term, the corporate authorities, and cannot, without the consent of the people, be clothed with the discretionary power of creating a debt *People* v. *Solomon*, 51 Ill. 37; *People* v. *Mayar*, id. 17; *Lovingston* v. *Wilder*, 53 id. 305; *Marshall et al.* v. *Silliman et al.*, 61 id. 218; *Dunnavan et al.* v. *Green*, 57 id. 60; *Decker et al.* v. *Hughes et al.*, 68 id. 33; *Wiley et al.* v. *Silliman et al.*, 62 id. 170; *Town of Elmwood* v. *Marcy*, 92 U. S. 289. The proper tribunal to decide whether the road had been completed was the board of auditors, or corporate authorities of the town. The legislature could not deprive them of their legal and constitutional right to determine that fact, nor confer the authority upon the supervisor and town clerk.

By the vote the issue of the bonds was only authorized on the actual completion of the road, and not when the supervisor and town clerk should declare that such completion was an accomplished fact.

The second plea expressly negatives any presumption that the officers who issued the bonds had decided that the conditions of their issue had been performed. It alleges that such officers were induced to issue and deliver them upon the false and fraudulent assurances of the company, that it would thereafter complete the road. This has never been done. The road was abandoned by the company immediately upon its obtaining the bonds.

Recitals, if made by the supervisor and town clerk in the bonds that such conditions had been performed, would be unauthorized by the Constitution of the State, the act of the legislature authorizing such subscription and the issue of bonds, the vote of the people, the contract of subscription, and the actual facts.

After the court had sustained a general demurrer to the second, fourth, and fifth pleas, the defendant did not further appear. On motion of the plaintiff, a jury was called "to try the issue joined on the plea herein." The jury found the issue for the plaintiff. There having been two issues joined, the jury only determined one, leaving the other undisposed of. The judgment on that verdict is erroneous, and should be reversed.

Mr. O. J. Bailey and *Mr. J. H. Roberts, contra.*

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

The questions presented for consideration upon this writ of error seem to have been concluded by the former decisions of this court.

The facts set out in the second plea do not constitute a defence to this action. It is not averred in that plea that the insurance company had, at the time it purchased the coupons in suit, any knowledge or actual notice of the special conditions embodied in the election notice, and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds to which these coupons were originally attached contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was undoubtedly bound to take notice of the provisions of the statute under which the bonds had been issued. But it was under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional.

Had the insurance company, before consummating its purchase of the coupons, examined the act incorporating the Chicago and Rock River Railroad Company, it would have ascertained: 1st, That the statute made no provision for condi-

tional subscriptions. 2d, That upon the approval by a majority of the legal voters of any incorporated city, town, or township, along or near the route of the road, at an election called and held for such purpose, in the mode prescribed by law, it was made, by the express words of the statute, the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor of such township, to make the subscription voted for, receive certificates therefor, and execute to the company bonds of the required amount, bearing interest, payable annually, and signed by such president, executive officer, or supervisor, and attested by the clerk of the municipality in whose name the bonds were issued. 3d, That, within ten days after the approval of a subscription by popular vote, it was the duty of the clerk to transmit to the county clerk a statement of the vote given, the amount voted, and the rate of interest to be paid; and, within like period, after bonds were issued, to file with the county clerk a certificate showing the amount and number of bonds issued, and the rate of interest to be paid. If it be suggested that the statement thus directed to be transmitted to and filed with the county clerk would inform the purchaser whether the subscription was conditional or absolute, a sufficient response is, that such statement might have been in conformity with the letter of the statute without setting forth the precise nature of the subscription. But a conclusive answer is, that there is no averment that any such statement was prepared, transmitted, or filed, or if filed, that it indicated the conditional nature of the subscription, by reference either to the election notice, or to the formal subscription of May 27, 1870. The plea shows that "the town and the citizens" (to adopt the language of the plea) were assured by the agents and representatives of the railroad company that the latter intended, in good faith, to perform the special conditions annexed to the subscription, and that all rumors to the contrary were without just foundation. These assurances were credited, and, in reliance upon them, the supervisor and clerk executed and delivered the bonds, knowing, at the time, that the conditions imposed by popular vote, as well as by the terms of the subscription, had not been complied with. Thus was faith in the promises of a

railroad company substituted for a contract which, had the town stood upon it, would either have secured the construction of the road, as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation, by its own officers, of the trust committed to them. By the act of the town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company, and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company.

For the reasons already stated, the fourth plea must also be held to be insufficient. The bonds were signed by the officers designated for that purpose by the charter of the railroad company, and, after the vote and subscription, it does not seem to have been necessary that the board of auditors or other corporate authorities of the town should have participated in their issue and delivery.

The fifth plea is radically defective. The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer* v. *Neff*, 95 U. S. 714, and authorities there cited.

We come now to consider the remaining assignment of error,

viz., that the court erred in rendering judgment upon the verdict. This objection rests upon the ground that although there were two issues to try, — those arising under the first and third pleas, — the jury were sworn to try "the issue," and found only "the issue" for the defendant in error.

We observe, from the record, that after the demurrer to the second, fourth, and fifth pleas was sustained, the city failed to appear, by attorney, at the trial before the jury. After verdict, a motion was entered to set aside the verdict and judgment and grant a new trial. But no written grounds were filed in support of the motion. Nor did the city appear at the hearing of the motion, and urge any reason for its being granted. It was, consequently, denied, and, in this court for the first time, specific objection is made that the jury were sworn to try, and, in fact, tried but one issue, and that it is impossible from the orders of the court to say what issue was tried. We decline to consider the objection. If the attention of the court below had been called to this matter, the objection might have been obviated. There is no bill of exceptions showing to what point the evidence was directed, and we will assume, under the circumstances of the case, that all the issues were tried which were presented in due form for trial, or which the parties desired to be disposed of. *Laber* v. *Cooper*, 7 Wall 565.

Our conclusion is that no error was committed in the court below.

Judgment affirmed.

MR. JUSTICE BRADLEY did not sit in this case, nor take any part in deciding it.

UNITED STATES v. WINCHESTER.

1. The admiralty jurisdiction of the district courts of the United States does not extend to seizures made on land.
2. The Abandoned and Captured Property Act of March 12, 1863 (12 Stat. 820), did not repeal the act approved July 17, 1862 (id. 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."
3. The order of the President for the seizure, under said act of July 17, 1862, of the property of persons engaged in armed rebellion against the United States, or in aiding and abetting the rebellion, is a prerequisite to the exercise by the District Court of its jurisdiction to adjudge the forfeiture and decree the condemnation of such property.
4. Cotton found on land in Mississippi was, Feb. 18, 1863, seized by the naval forces of the United States, without the order of the President, and delivered by an officer of the navy to the marshal of the United States for the Southern District of Illinois. A libel was filed in the District Court for that district, alleging as the ground of seizure that the cotton belonged to a person in armed rebellion against the United States. The cotton was sold, and a decree rendered, whereby one half of the proceeds was paid into the treasury of the United States, and the other half ordered to be paid to the officer as informer, who declined to accept it, and the check therefor was deposited with the assistant treasurer at St. Louis, on whom it had been drawn. At the instance of the admiral, the Supreme Court of the District of Columbia sitting in admiralty took jurisdiction of the case, and ordered the check to be deposited with the assistant treasurer at Washington, and the money to remain in his hands subject to the further order of the court. The check was so deposited, and the court by its decree distributed the money to the captors. *Held*, that the decrees were void, and that the owner of the cotton was entitled to recover the net proceeds of the sale of it.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Attorney-General for the appellants.

Mr. Joseph S. Fowler and *Mr. John Pool*, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

The claimant is the surviving executor of the will of John C. Jenkins, who died in 1855, leaving four minor children, and possessed of a plantation in the State of Mississippi, on the Mississippi River, above Vicksburg. By directions in the will, the plantation was to be cultivated by the representatives of the estate for the benefit of the testator's children.

On the 18th of February, 1863, there was on this plantation belonging to the estate and raised thereon according to the provisions of the will, a quantity of cotton, one hundred and sixty-eight bales of which were on that day seized by the naval forces of the United States, and taken on board of a government steamer. The cotton was then carried to Johnson's Landing, on the river, and thence to Milliken's Bend; where, with other cotton, making in all two hundred and fifty-eight bales, it was shipped on board of the transport "Rowena," by order of Admiral Porter, who was in command of the naval forces on the Mississippi.

In March following, the admiral reported the capture of this cotton to the Secretary of the Navy, and was informed, in reply, that all property captured as "prize property" must be sent to a prize court for adjudication, and be disposed of as the court might decree; and that the disposition of captured "abandoned property" was provided for by an act of Congress of March 12, 1863. The cotton was thereupon sent to Cairo, where it arrived on the 7th of April, 1863, and was delivered to Captain Pennock, commanding at the station, and was by him turned over to the United States marshal of the district. Soon afterwards, upon information given by Captain Pennock, the United States district attorney filed a libel in the District Court of the United States for the Southern District of Illinois for the condemnation and sale of the cotton as forfeited to the United States. The libel stated that the seizure was made by order of Admiral Porter, on the Mississippi River, that river "being a public water of the United States, navigable to the sea by vessels of ten or more tons burden;" and that the seizure was made for violation of the Non-Intercourse Act of July 13, 1861, and the proclamation of the President of Aug. 16, 1861; and because the property belonged to a person in armed rebellion against the government of the United States; and that the case was within the admiralty jurisdiction of the court. The case then proceeded, in accordance with the forms of admiralty practice and entitled as in admiralty, to a decree condemning the property as forfeited to the United States. The decree was subsequently opened as to part of the property, and the libel was amended by striking out the first allegation

as to the Non-Intercourse Act, which was inapplicable to the cotton belonging to the estate of Jenkins and seized on his plantation.

Pending the proceedings, the cotton was sold, and by the decree one half of the proceeds was paid into the treasury, and the other half ordered to be paid to Captain Pennock, as informer, to whom a check for that amount was delivered. Captain Pennock handed the check to Admiral Porter, his superior officer. The admiral, unwilling to receive or keep it as informer, sent it to the Secretary of the Navy, requesting that the money might be distributed among the officers and crews of the Mississippi squadron as captors. The secretary refused to distribute the money, and returned the check to the admiral, and he deposited it with the assistant treasurer at St. Louis, upon whom it was drawn.

Treating the proceedings in the District Court as in admiralty, they are without validity. The admiralty jurisdiction of the District Court extends only to seizures on navigable waters, not to seizures on land. The difference is important, as cases in admiralty are tried without a jury, whilst in cases at law the parties are entitled to a jury, unless one is waived. *United States* v. *Betsey*, 4 Cranch, 443; *The Sarah*, 8 Wheat. 391.

But it is contended by the Attorney-General that the proceedings, however loose and defective in form, can be sustained under the Confiscation Act of July 17, 1862, upon the charge that the property was seized as belonging to a person in armed rebellion against the government of the United States. Assuming that upon a vague allegation of this kind, without designation of the owner, and with an erroneous statement in the libel of the place of seizure, a valid decree of condemnation could be rendered under the act of 1862, previous to the passage of the Captured and Abandoned Property Act, it is contended on the part of the claimant that by the passage of this act the provisions for confiscating property, in the act of 1862, are impliedly repealed, as being repugnant to those of the latter act. We do not think so. We agree with the Court of Claims on this point.

The whole scope and purpose of the two acts are different

The first act provides for the punishment of treason, the seizure, condemnation, and sale of property of persons engaged in the rebellion, and the payment of the proceeds into the treasury, to be applied to the support of the army of the United States. It was directed against persons committing certain overt acts of treason, and against their property. Its object was to punish the persons and to confiscate their property, and contemplated in the latter proceedings equally as in the former the intervention of judicial authority.

The second act was designed to reach all property, with few exceptions, in the insurgent States, seized or taken from hostile possession by the military or naval forces of the United States, whether belonging to friends or enemies, as well as property taken while the owner was voluntarily absent and engaged in aiding or encouraging the rebellion. It provided for a sale of the property thus captured or abandoned without judicial proceedings, and the payment of the proceeds into the treasury, allowing the loyal owner who had never given aid or comfort to the rebellion the privilege of pursuing the proceeds in the Court of Claims. There was also a marked difference in the effect of the proceedings under the two acts. The Confiscation Act authorized proceedings only against the interest of the disloyal owner; the Captured and Abandoned Property Act directed the seizure of the property itself; and its sale carried the title against all claimants. The former also took the property wherever it was found; the latter only in the insurgent States. The former, as respects property, had all the merciless features inseparable from a war measure, and treated as enemies, whose property could be confiscated, all residents within the insurgent States; the latter had this beneficent provision, that it made a discrimination among those whom the rule of international law classes as enemies, in favor of those who, though resident within the hostile territory, maintained in fact a loyal adhesion to the government. The two acts can stand together, and the Confiscation Act be enforced as to all property seized under its provisions. The position of the claimant, as to an implied repeal from a supposed repugnancy of the provisions of the two acts, is not, therefore, tenable.

But upon another ground, apparent upon the face of the

record, the proceedings and decree of the District Court cannot be sustained. There was no previous seizure of the property under any order of the executive; and such seizure was an essential preliminary to give jurisdiction to the court to adjudge its forfeiture and decree its condemnation. The executive seizure is the foundation of all subsequent proceedings under the Confiscation Act. Such is the plain import of the law, and it was so held by this court in *Pelham* v. *Rose*, 9 Wall. 103, and reaffirmed in *The Confiscation Cases*, 20 id. 92. Here the property was seized by the naval forces of the United States upon the notion that being property in the enemies' country, it was subject to capture as a prize of war. The Secretary of the Navy, when informed of the capture, instructed the admiral in command that the disposition of captured abandoned property was provided for by the act of March 12, 1863, evidently regarding the property as coming within that class, if not "prize property." No seizure by executive order is alleged in the libel, for none such was made. The seizure alleged is one made by the naval forces, and even that is stated to have been made at a place other than the plantation of the testator. No validity can be ascribed to a decree by a court which thus never had the property rightfully before it for condemnation. For one-half of the proceeds of the sale paid into the treasury under the decree the claimant is, therefore, clearly entitled to judgment.

As to the remaining half also we have no doubt. The check which Captain Pennock received under the decree of the court, included not only one-half of the proceeds of the claimant's cotton, but of cotton libelled in other cases, amounting in the whole to $59,943.42. The admiral of the squadron to whom Captain Pennock turned over the check, desired, as already stated, that the money should be distributed among the officers and crews of the Mississippi squadron as captors; and when the Secretary of the Navy declined to make the distribution, he deposited the check with the assistant treasurer at St. Louis, upon whom it was drawn. Subsequently, in July 1864, the admiral invoked the aid of the District Court of the District of Columbia to make the distribution, and placed in the hands of the district attorney a certificate stating that the amount

decreed to him as informer, namely, $59,943.42, was on deposit with the assistant treasurer at St. Louis, and expressing his wish as to the distribution of the money, accompanying the certificate with a check for the amount. The District Court took jurisdiction in admiralty of the case, and ordered the check to be deposited by the marshal with the assistant treasurer at Washington, and that the money should remain in his hands subject to the further order of the court. The check was accordingly deposited with the assistant treasurer, and by a subsequent decree the court ordered the money to be distributed as desired, after the payment of certain costs and disbursements incurred in the proceedings.

It is not a question upon which contention can arise that these proceedings of the District Court of the District of Columbia were extra-jurisdictional from beginning to end; and indeed it is apparent from inspection of the decree that the court, assuming as valid the action of the Illinois court, proceeded to distribute the money more upon the request of the admiral than upon any authority conferred by law. The decree of distribution signed by the Chief Justice of the District Court shows the kind disposition of a learned magistrate to carry out the generous intentions of a gallant admiral to distribute among the officers and crew under his command money awarded to him as informer, but which he refused to take in that character, without assuming any authority beyond what the admiral implored him to exercise. But as the Illinois court had no jurisdiction to award to the admiral or his captain the money thus generously distributed, we are of opinion that the claimant must have judgment for the amount as well as for the other moiety of the proceeds of the cotton belonging to the estate of his testator.

In the views thus expressed we have merely stated, in brief, the conclusions of the Court of Claims. In the opinion of that court the questions are so fully, clearly, and exhaustively discussed as to leave nothing to be added.

Judgment affirmed.

VAN NORDEN v. MORTON.

Whenever a statute grants a new right, or a new remedy for the violation of an old right, or whenever such rights and remedies are dependent on State statutes or on acts of Congress, the jurisdiction, as between the law side and the equity side of the Federal courts, must be determined by the essential character of the case. Unless it comes within some of the recognized heads of equitable jurisdiction, the remedy of the party is at law.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Thomas J. Durant for the appellant.
Mr. John A. Campbell, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The complainant filed his bill addressed to the Circuit Court sitting in chancery, alleging that he is the owner of dredge-boat No. 3, lying in the river at New Orleans; that Morton, Bliss, & Co. having obtained a judgment in the same court against the Mississippi and Mexican Gulf Ship Canal Company for over $24,000, had issued an execution on said judgment, under which the marshal had seized dredge-boat No. 3, and had advertised to sell it to satisfy the writ; that he, and not the Ship Canal Company, is the owner of the boat; that it is not liable to be taken on said execution; that the seizure has already subjected him to a loss of $5,000, and that his continued deprivation of its use will cause him much greater loss. He prays for process, that the judgment plaintiffs and Packard, the marshal, be made defendants, and enjoined from interfering with him in the possession of the boat; that he be quieted and maintained in his title and possession, and defendants decreed to pay him $5,000 aforesaid as damages. A temporary injunction was granted. Answers and a replication thereto were filed, depositions and other testimony taken. On hearing, the court dissolved the injunction and dismissed the bill.

The first question we are called to consider is, whether the Circuit Court had jurisdiction of this suit in equity.

If the case had arisen in any State where separate jurisdic-

tion at common law and in equity was fully recognized, there could be no difficulty in answering this question in the negative.

The remedy in all times for this trespass, which is a very common one, has been by an action of replevin to take the property out of the hands of the sheriff or marshal and return it to the owner, or to leave the officer to proceed with the sale of the property and sue him or the purchaser in trespass for its value and for any incidental damage. In the one case the party whose property was wrongfully seized recovered possession of it. In the other he recovered compensation for its loss. No case has been cited to us — we presume none can be found — where equity has interfered under such circumstances. *Watson* v. *Sutherland* (5 Wall. 74) is cited by the appellant. In that case, Sutherland, the party whose goods were seized, was engaged in a successful dry-goods trade. The seizure was of all his goods, and it closed his store, and if continued would have broken up a profitable business. For this the court held that the action at law for damages could have given no adequate remedy. The equitable jurisdiction, as will be seen by an examination of the opinion of the court, rested solely on that consideration. The case, as it was, is a very close one, and its main feature is absent in the one before us. There is no reason to believe that the value of the dredge-boat would not be adequate compensation for its loss, and no such allegation is made in the bill. On the contrary, the complainant claims $5,000 damages for the loss of its use while held by the marshal.

It is said, however, that the code of Louisiana does not give an action of replevin in any case, or its equivalent, and that it does give a specific remedy for cases of this class, which, in its nature, is of an equitable character, and should be administered in the Federal courts on the equity side of the calendar.

If the first proposition were true, there would still remain an adequate remedy by an action at law for damages. But while it is true that the Louisiana code provides no process by which, in advance of a judgment as to the right of the parties, personal property can be taken from the possession of one party and delivered to the other, it does provide the remedy of sequestration, by which the possession of the property which is the subject of the litigation may be taken by order of the court and held until

the right is decided. See Sequestration, Code of Practice, art. 269–283. Under these articles we see no reason why the complainant might not have brought suit and recovered the ultimate possession of his boat and damages for its detention.

The special provision for such cases as the present is found in art. 298, par. 7, of the same Code of Practice. The whole of sect. 5 is devoted to injunctions, and a careful reading of all the subdivisions shows that the word is used as applicable to cases which are in their nature of a common-law character, and that it is used as synonymous and interchangeably with prohibition. It is also authorized in some cases which with us would be undoubtedly of chancery cognizance.

We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on State statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the Federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the other.

The case of *Thompson* v. *Railroad Companies* (6 Wall. 134) had been removed from the State court into the Circuit Court of the United States. In the latter a bill in chancery was filed and a decree rendered in favor of the complainant. On appeal, this court held that the case had no feature of equitable cognizance, and ordered it to be dismissed without prejudice. It was conceded that if the case had remained in the State court the plaintiff could have recovered.

The court said: "The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be

bleaded together in one suit," citing *Robinson* v. *Campbell* (3 Wheat. 212) and *Bennett* v. *Butterworth* (11 How. 669), to which we take leave to add *Jones et al.* v. *McMasters* (20 id. 8) and *Basey* v. *Gallagher* (20 Wall. 680).

With this criterion before us, we are of opinion that the remedy provided by the Code of Practice of Louisiana is a simple application to the court from which the writ issued to remedy the evil of an erroneous levy of the execution. It says: "The injunction must be granted and directed against the defendant himself, in the following cases: . . .

"When the sheriff, in the execution of a judgment, has seized property not belonging to the defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner, or is guilty of any other act in the execution of his office."

Now this obviously refers to the control of the court over its own officer, in the execution of its own writs, and is as applicable to other misconduct of that officer in the execution of his official duties, as in cases of seizure of property not liable under an execution in his hands. The remedy needs no formal chancery proceeding, but a petition or motion, with notice to the sheriff, is not only all that is required, but is the most speedy and appropriate mode of obtaining relief.

This relief does not depend on any inadequacy of an action for damages or by sequestration. It is a short, summary proceeding before the court under whose authority the officer is acting, gives speedy relief, and is very analogous to the statutory remedy given in many of the Western States in similar cases to try the right of property at the instance of the party whose property is wrongfully seized. It has no element of equitable right or procedure, and as a court of chancery the Circuit Court had no jurisdiction of the case.

Although the court below dismissed the bill, it was a decision on the merits, and not for want of jurisdiction. The decree recites that the case was heard on bill, answer, replication, exhibits, and proofs, and on consideration thereof the bill was dismissed. This decree would be a bar to any other action which complainant might bring at law.

In accordance with the settled rule of this court, as shown in

the case above cited, of *Thompson* v. *Railroad Companies* and *Kendig* v. *Dean* (97 U. S. 423), this decree must be reversed, and a new one entered dismissing the bill for want of jurisdiction, and without prejudice to the right of complainant to bring any action at law or other proceeding which he may be advised; and it is

So ordered.

RYAN *v.* RAILROAD COMPANY.

1. An act of Congress (14 Stat. 239) granted to a railroad company, to aid in the construction of its road, every section of public land designated by odd numbers, to the amount of "twenty alternate sections per mile (ten on each side) of said railroad line," and provided that, where any of said sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, the company should, in lieu thereof, select, under the direction of the Secretary of the Interior, other lands nearest to the limits of said sections, and not more than ten miles beyond them. There being a deficiency of said sections to satisfy the grant, the company, with the approval of said Secretary, selected as part indemnity a quarter of an odd-numbered section of public land within ten miles beyond those limits, and obtained a patent therefor from the United States. When so selected, it was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had been finally rejected as invalid. *Held*, that the patent conveyed a perfect title to the company.
2. *Newhall* v. *Sanger* (92 U. S. 761) cited and distinguished from this case.

APPEAL from the Circuit Court of the United States for the District of California.

This is a suit in equity brought by Ryan to enjoin and restrain the Central Pacific Railroad Company from relying upon or using as evidence a patent issued to it by the United States for a certain tract of land in California.

The company is successor to the California and Oregon Railroad Company, to which, in aid of the construction of a railroad, Congress granted land by an act approved July 25, 1866 (14 Stat. 239), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," the second section whereof is set out in the opinion of the court.

The land in controversy is situated within the indemnity or ten-mile limits beyond the alternate sections first named in the act, and at its date was within the exterior boundaries of a certain Mexican claim known as the Manuel Diaz grant, which was finally rejected as invalid, March 3, 1873.

Oct. 30, 1874, the company finding that there were not sufficient odd-numbered sections within the limits of its grant, not otherwise granted, &c., to make the quantity to which it was entitled, made selection of the land in controversy, the same being then public land, and applied for a patent therefor, in all respects in the manner provided by said act. This selection was examined by the register and receiver of the proper land-office, and it appearing to them that there were not sufficient alternate sections within the twenty-mile limits of the railroad grant, not otherwise granted, &c., to satisfy the grant, they, Dec. 26, 1874, approved the selection as indemnity for a portion of the lands so lost, and thereafter forwarded the same to the Commissioner of the General Land-Office. The selection was thereupon approved by the Secretary of the Interior, and a patent was issued to the company, March 17, 1875.

Ryan being in all respects qualified to avail himself of the provisions of an act of Congress, entitled "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862 (12 Stat. 392), filed an application, July 14, 1876, accompanied by his affidavit, as required by said act, in the proper land-office, to be allowed to enter as a homestead the quarter-section so selected by, and patented to, the company; and he thereupon paid the lawful fees, and received a duplicate receipt from the register and receiver therefor. He subsequently built a house thereon, and, Nov. 4, 1876, moved with his family into said house, where he continued to reside until the commencement of this suit. He alleges that the said patent is held and asserted by the company in hostility to his title.

The court dismissed the bill, and Ryan appealed here.

Mr John Currey for the appellant.

The Attorney-General for the United States.

If the right of the company to land within the indemnity limits attached at the same time as its right to the odd-numbered sections within the original limits, it is conceded by the

counsel for the appellee that the rule in *Newhall* v. *Sanger* (92 U. S. 761) is applicable to this case, and, if adhered to, must govern its decision.

The records of the Department of the Interior establish that the order withdrawing the lands from sale or other disposal embraced those within the granted and the indemnity limits alike; and the question recurs, whether that order was authorized and required by the act under which the appellee claims.

The grant was *in præsenti*, and acquired precision upon the definite location of the road. *Railroad Company* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 id. 44; *Leavenworth, &c. Railroad Co.* v. *United States*, 92 U. S. 733. Upon such location, it was made the duty of the Secretary of the Interior to order a withdrawal from sale of the public lands granted "within the limits before specified." What were they? Manifestly thirty miles on each side of said line of road. The language of the act is "twenty alternate sections per mile (ten on each side) of said railroad line." Ten alternate sections on either side of said road could only be found by extending over a space of twenty miles.

This is the first limit mentioned in the act.

If the twenty alternate sections were not found within that limit, then the company had the right to select other lands in lieu of those "sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of" within the next ten miles.

This is the second limit mentioned in the act.

The act, however, requires the withdrawal "within the limits before specified," the plural being used, evidently, to include both limits. Where the word "limits" occurs in the preceding part of the second section, it means the twenty miles on each side of the road; but in the clause "within the limits before specified," it refers to the entire limits of the grant.

The order of withdrawal, therefore, properly embraced both the twenty and the ten mile limits. Any other manner would not have been in accordance with the terms of the act. Certainly Congress would not have required the lands within the indemnity limits to be withdrawn, if they were not included in the grant.

The grant was of ten sections per mile on each side of the road, provided, at the time of its definite location, the United States owned that quantity within thirty miles of either side thereof. It is urged by the appellee that the grant acquired precision upon such location, only as to the lands included within what is termed the granted limits. This is clearly incorrect. Every alternate section of public land within the indemnity limits, so called, was, by the order of withdrawal, subject to the grant. By such location, and that order, the company acquired a vested right in each section, viz. a right to a patent, provided any section of land or a part thereof, within the first limits mentioned, was lost by any of the ways specified in the act.

While it is true that no title to land within the indemnity limits passed absolutely upon such location, it is also true that the right to acquire title to the alternate sections there situate was granted. Upon the order of withdrawal, the right of the United States to dispose of them ceased. The title within those limits is acquired by virtue not of the selection, but of the grant, although that is made definite by the selection. The title to public lands can only be derived under a general or a special act of Congress. *Wilcox* v. *Jackson*, 13 Pet. 498; *Bragnell* v. *Broderick*, id. 436.

Under the ruling of the Department of the Interior the grant to the company attached at the same time to all the odd-numbered sections of public land within the granted and the indemnity limits.

This construction, although not binding upon this court, is entitled to great respect (*United States* v. *Dickson*, 15 Pet. 141); and we submit that having received the benefit of it, and thereby obtained thousands of acres of valuable land which otherwise would have been disposed of by the government, while thousands of other acres have been, and still are, withheld from disposal, the company should not be permitted now to question the correctness of such construction.

Mr. S. W. Sanderson, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

After this case was submitted to the court upon printed

arguments by the counsel of the parties, the Attorney-General expressed a wish to be heard in behalf of the United States, and an oral argument was thereupon ordered. The case was argued in that way, fully and ably, by that officer and by the counsel for the appellee, and I am directed now to deliver the opinion of the court.

There is no controversy about the facts.

By the act of Congress of July 25, 1866, Congress granted certain lands to the California and Oregon Railroad Company. The appellee claims under that grantee, and has succeeded to its rights. At the date of the act there was pending a claim for the confirmation of a Mexican grant, which embraced within its boundaries the premises in controversy between these parties. The appellant insists that he has a paramount title, not under, but by reason of this claim, as will hereafter appear.

The second section of the act referred to is as follows: —

"SECT. 2. And be it further enacted, that there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of the said first-named alternate sections," &c. 14 Stat. 239.

Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.

On the 3d of March, 1873, the alleged Mexican grant was

declared invalid by this court and finally rejected. On the 30th of October, 1874, it was found there was not enough of the alternate odd sections within the primary limits to satisfy the grant to the railroad company. On that day the appellee selected the land in question. Though not within them, it was within the indemnity limits prescribed in the act, and was intended in so far to supply the deficiency within the former. The selection was approved by the local land-officers on the 26th of December, 1874. This approval was confirmed by the Secretary of the Interior, and a patent in due form was issued to the appellee on the 17th of March, 1875. At the time of the selection the premises were public land. The Mexican claim had been rejected by this court more than a year and a half before, and the land was not within any exception expressed or implied in the act. Afterwards, on the 14th of July, 1876, the appellant being in all respects qualified, filed an application in due form to be allowed to enter the land in question under the homestead act of 1862. He paid the proper fees and received a duplicate receipt from the register and receiver of the land-office of the district. He filed this bill to restrain the appellee from availing itself of the patent, upon the ground that the land was not subject to selection in lieu of the deficit of odd sections within the twenty-mile limits specifically granted by the act.

After this plain statement of the case, it is difficult to imagine any defect that can exist in the title of the appellee, or any right, legal or equitable, that the appellant can have.

But it is said the case is within the principle established in *Newhall* v. *Sanger* (92 U. S. 761), and must be controlled by that adjudication. This is the sole objection to the appellee's title, and it is founded in a mistake. The two cases are distinguishable by a broad line of demarcation.

In the former case, the lands covered by the false Mexican claim were situated within the limits of the territory where the right of the company attached to the designated odd sections granted when the road was located and the requisite maps were made. At that time the claim was in litigation, and *sub judice*. The court held that under these circumstances the premises were not "public land," within the meaning of the

law, and could not become such until the title of the government was vindicated by the defeat of the claim, and that the patent issued to the railroad company was, therefore, void.

After the Mexican claim had been disposed of and before a new appropriation was made or attempted to be made by the company, the junior patent was issued to another party, and it was held that he had a valid title. The Mexican claim was finally rejected by this court on the 13th of February, 1865. It was insisted by the company that the judgment should be held to relate back to the first day of the term, so as to disembarrass the title of the claim as of that date. This was refused. The court said, "to antedate the rejection of a claim so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice, and cannot be sanctioned." It was admitted by clear implication that if the lands had been thus disembarrassed at the date of the grant, or their withdrawal from sale, the elder patent would have been valid.

Again, speaking of lands embraced in such a claim the court says expressly, "they were regarded as forming a part of our public domain only after the claim covering them had been finally rejected." . . . "They then became *public* in the just meaning of that term, and were subject to the disposing power of Congress."

Here the land was not a part of the alternate odd sections specifically granted. It was not within the limits of that territory. There, there was a deficiency.

It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice*, and was no longer in litigation. It was as much "public land" as any other part of the national domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. The Mexican claim when condemned lost its vitality. From

that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed. In this state of things the appellee acquired its title, and that title is indefeasible.

Newhall v. *Sanger* applies only where the adverse claim is undisposed of when the grant would otherwise take effect. It has no application as to the future after the claim has ceased to exist.

Decree affirmed.

MR. JUSTICE HARLAN concurred in the judgment, because Ryan, upon the face of his bill, was not entitled to any relief from a court of equity. The bill should have been dismissed without any consideration of the merits of the case, about which he expressed no opinion.

HALE v. FROST.

1. Mortgages of the road and present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, are, while it retains possession, a prior lien upon the net earnings of the road.
2. The net earnings, while the road is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. *So held*, where from such earnings payment was made to parties who had, before his appointment, furnished the company with car-springs, and spirals and supplies for its machinery department, which he continued to use in carrying on the business of the road.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Between 1867 and 1873, The Burlington, Cedar Rapids, and Minnesota Railway Company, a corporation duly organized under the laws of Iowa, built and put in operation its main line from Burlington, *via* Cedar Rapids, to Plymouth; the Pacific Division, extending west from the main line at Vinton; the Muscatine Division, extending from Muscatine west across the main line; and the Milwaukee Extension, extending from

the main line near Cedar Rapids to Postville. The main line was mortgaged May, 1869; the Pacific Division, September, 1871; the Milwaukee Extension, January, 1872; and the Muscatine Division, July, 1872. The mortgages were made to trustees to secure the bonds of the company, and covered the road, all rights of way, rolling-stock, and equipment; all implements, fuel, and materials for the construction, operating, repairing, or replacing the road or any of its branches; and also all franchises connecting with or relating to the road, which were then held or might thereafter be acquired by the company; and also all rights, claims, and benefits in and to all leases, contracts, and agreements then made or which might thereafter be made with any parties whomsoever, together with all and singular the tenements and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estates, rights, titles, and interests whatsoever, as well at law as in equity, of the company. The mortgages were authorized by statute, and were in due time and in the proper offices recorded.

The company, Nov. 1, 1873, made default in paying interest due for the preceding six months. The bondholders funded their interest coupons due respectively at that date and at six and twelve months next thereafter, and allowed the company to retain the possession of the road. The company, May 1, 1875, again made default in the payment of interest; and on the 19th of that month the trustees filed a bill against the company, to foreclose the several mortgages. A receiver was thereupon appointed by the court, who took immediate possession of the road and its branches. The company has never since had possession of them, or received any of the rents or profits thereof.

When the company first made default in the payment of interest, there was a "floating debt" of about $1,600,000, for equipment, construction, repairs, wages, taxes, &c. Between Nov. 1, 1873, and May 1, 1875, the gross earnings of the main line and branches were about $1,772,249.74; and the net earnings during the same time, over and above operating expenses, taxes, &c., were about $550,000, all of which were disbursed in the payment of the "floating debt." The company owed, Nov. 1, 1873,

for back wages to employés, taxes, and current supplies then on hand and subsequently used by it, about the sum of $150,000. When the receiver was appointed, May 19, 1875, there was due for back wages to employés, $81,250.02, and for current supplies, about $60,000. The records of the court below show that while the railway and branches were under his control their net earnings, over all operating expenses, for eight and one-third months, were $387,540.35.

The Union Car-Spring Manufacturing Company, Dec. 6, 1875, and the firm of Hale, Ayer, & Co., Aug. 18, 1875, intervened and filed their respective petitions. Each prayed for an order upon the receiver to pay its claim.

The facts were agreed upon, and it appears therefrom that the car company sold and delivered to the railway company during the month of April and the last of March, 1875, car-springs and spirals of the value of $469.42, which the receiver after his appointment continued to use, and for which nothing had been paid; that Hale, Ayer, & Co., Aug. 1 and 10, 1873, had an accounting and settlement with the railway company, in which it appeared that it was then indebted to them, including interest, in the sum of $21,738.92.

At sundry times and in various amounts the sum of $12,295.74 was paid on account of the notes given in settlement of said indebtedness of $21.738.92, of which $5,919.25 was for supplies to machinery department, $14,944.24 for materials for construction purposes, and $875.43 interest.

Another settlement was made Jan. 20, 1874, for $6,955.63 due from said company to them, being $4,422.99 for invoices of supplies for machinery department, $2,208.75 for material for construction purposes, and $323.89 interest.

The company's note for $1,552.78, given to them for supplies for machinery department in August, 1872, matured Feb. 13, 1874, and the total amount due them was $17,951.59, for which they held the overdue notes of the company. No mechanic's lien was claimed. The judges below were opposed in opinion upon the following points claimed by the interveners: —

1. That the railway mortgage is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road is in the possession of the company.

2. That after the default in the payment of the interest Nov. 1, 1873, the fact that the mortgagees funded their coupons and left the company in possession of the road constituted the company their agent and trustee in equity, and they are now estopped from objecting to the payment from the earnings of the road of all legitimate debts contracted by the company for operating expenses.

3. That the net earnings of the road, while in the possession of the court, and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the Chancellor in the payment of claims which have superior equities, if such shall be found to exist, and that these intervening petitioners' claims have superior equities to those of the mortgagees.

The petitions were dismissed, and the interveners appealed here.

Mr. Charles A. Clark and *Mr. N. M. Hubbard* for the appellants.

Mr. James Grant for the appellee.

MR. CHIEF JUSTICE WAITE announced the decision of the court.

The first question certified in this case is answered in the affirmative, upon the authority of *Fosdick* v. *Schall*, *supra*, p. 235.

The third question is answered in the same way upon the same authority. The Union Car-Spring Manufacturing Company is entitled to payment in full, and Hale, Ayer, & Co. to payment of so much of their claim only as is for supplies to the machinery department. There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes.

An answer to the second question is unnecessary.

The several decrees appealed from will be reversed, and the cause remanded with instructions to enter decrees in favor of the appellants for the amount due them respectively from the fund in court, upon the principles settled by the answers which are given to the questions certified; and it is

So ordered.

HARTMAN v. BEAN.

A. purchased, May 8, 1875, certain high wines from B., which the latter had produced and removed from his distillery to the bonded warehouse, the tax not having been paid on them. The collector of internal revenue was duly notified of the sale. While they were there, the Commissioner of Internal Revenue, under authority of sect. 3309 of the Revised Statutes, assessed a tax on the number of proof gallons of spirits distilled by B. at that distillery between Jan. 6 and March 8, 1875. *Held*, that the wines so purchased by A. were subject to the lien of the tax, and also, in case of its non-payment, to the interest penalty and charges provided by law.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. F. W. Cotzhausen for the plaintiff in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

High wines produced by distillation, like other distilled spirits when removed from the place where the same were distilled, if not deposited in a bonded warehouse, as required by law, become liable to the same internal-revenue tax as that prescribed to be paid by the distiller, owner, or person in possession thereof before the same is removed from the bonded warehouse; and the provision is, that when the commissioner obtains knowledge that such distilled spirits have been so removed, and that the same are not deposited in the bonded warehouse, it is made his duty to assess the distiller for the amount, and to return the assessment to the collector, who is directed to demand payment of the tax; and if the distiller neglects and refuses to pay the assessment, the requirement is that the collector shall proceed to collect the same by distraint. Rev. Stat., sects. 3251, 3253.

Certain high wines which the plaintiff alleges that he owned, and which he claims that he purchased of the distiller, were seized and sold by the defendants, under and by virtue of a warrant of distraint for the collection of certain internal-revenue taxes assessed against the distiller of the same, of

whom plaintiff made his purchase. Sufficient appears to show that the plaintiff is, and for a number of years has been, engaged in business as a rectifier of such wines and as a wholesale dealer in liquors, and that the principal defendant is the collector of internal revenue for the district, the other being his deputy.

Liquors of the kind, when lawfully removed from the distillery and deposited in a warehouse, are frequently sold by the distiller subject to tax, but while they remain in the warehouse they are subject to the regulations prescribed by the act of Congress. Such distillers are required, on the first day of each month, or within five days thereafter, to render, under oath, to the collector of the district, an account in duplicate, taken from their books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons of spirits produced and placed in warehouse.

Accounts of the kind in duplicate are required; and it is made the duty of the collector to transmit one of the same to the commissioner, and on the receipt of the return the commissioner is directed in each month to inquire and determine whether the distiller has accounted for all the grain or molasses used and the spirits produced by him in the preceding month.

Even if the commissioner is satisfied that the distiller has reported all the spirits produced by him, still if the quantity reported is less than eighty per centum of the producing capacity of the distillery, he is required by law to make an assessment for such deficiency at the rate of ninety cents for every proof gallon; but if the commissioner finds that the distiller has not accounted for all the spirits produced by him, the act of Congress directs that he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and that an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of ninety cents for every proof gallon, the same as if the true quantity had been reported. Id., sects. 3307, 3309.

Much discussion of the facts is unnecessary, as there is no conflict in the evidence as reported in the bill of exceptions.

On the 8th of May, 1875, the plaintiff in good faith purchased the high wines mentioned in the declaration of the distiller. They had been produced at the distillery of the seller, and were regularly deposited in the bonded warehouse, the tax not having been paid; and it appears that the purchaser paid for the spirits twenty-six cents for each proof gallon, subject to tax. Purchases of the kind had frequently been made by the plaintiff; and the bill of exception states that it is the custom to make such purchases subject to tax, the purchaser withdrawing the same from time to time on payment of tax, as fast as the spirits are wanted in his business. Written notice of the sale and purchase was given to the collector on the same day, and the statement is that the notice has ever since remained on file in his office.

Irregularity in the transaction is not suggested; and it appears that the plaintiff, not needing the high wines for immediate use in his business, allowed the same to remain in the bonded warehouse, which constituted a part of the distillery premises where the wines had been manufactured, he, the purchaser, not making any application to remove or withdraw the same until after the tax in question had been assessed, as required by the internal-revenue act of Congress.

Prior to such application, to wit, on the 10th of June subsequent to the purchase by the plaintiff, the commissioner, pursuant to the provision contained in the section of the Revised Statutes last above cited, assessed the distiller and vendor of the plaintiff the sum of $2,857.68 as an internal-revenue tax on $4,082\frac{88}{100}$ proof gallons of high wines distilled by the said distiller at his said distillery between the 6th of January and the 8th of March of the same year the purchase of the distilled spirits was made by the plaintiff.

Due notice in writing of the tax and demand of payment were made by the collector of the district, and the bill of exceptions states that the distiller wholly neglected and refused to make the payment. Assessment being duly made and payment being refused, the collector, pursuant to law, issued his warrant of distraint, and the deputy collector seized and sold the property to make the money. Immediate redress was sought by the plaintiff through the present action of trover,

commenced in the State court. Service having been made, the defendants appeared, and on their motion the cause was removed into the Circuit Court, where the answer of the defendants was filed. Both parties appeared in the Circuit Court, and having waived a jury, they submitted the cause to the determination of the court. Hearing was had; and the court being of the opinion that in point of law there was a lien on the high wines for the taxes assessed by the commissioner, under the provision before referred to, held that the action could not be maintained, and that the assessment of the tax and the sale of the spirits under the warrant of distress were valid. Judgment being rendered for the defendants, the plaintiff removed the cause into this court, and assigns for error that the Circuit Court erred in the conclusions of law set forth in the transcript, he, the plaintiff, insisting that the high wines were neither subject to a lien for the tax nor to seizure under the warrant of distraint, and that the withholding and sale of the same constituted a conversion.

Formal application to withdraw the high wines from the bonded warehouse was made on the 14th of July subsequent to the assessment, and the bill of exceptions shows that on that day the plaintiff caused the statements and certificates required by law to be made out for that purpose, and that he tendered to the collector the tax on the same, meaning the tax assessed on the quantities reported by the distiller; but the leave to withdraw was refused, because the corrected assessment by the commissioner had previously been made for the difference between the quantity reported and the quantity shown to have been actually produced.

Actual seizure of the high wines was made by the deputy collector on the 8th of the same month, and it appears that he advertised the same for sale on the same day. Prior to the sale, to wit, July 22, the plaintiff tendered to the collector the amount of the tax admitted to be due and owing on the said high wines, at the rate of ninety cents per proof gallon, demanded possession thereof, and that the levy be released and the sale abandoned; but the defendants refused to release the property, and the same was sold on the following day under the warrant of distress and pursuant to the antecedent adver-

tisement. But such a tender, even if it included the corrected assessment, could not benefit the plaintiff, as it did not cover either interest or penalty for the non-payment.

Beyond all question, the corrected assessment made was fully authorized by the act of Congress, as the same section provides that all assessments made under that section shall be a lien on all distilled spirits, the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid and discharged Rev. Stat., sect. 3309.

Argument to show that that provision secures a lien upon the distilled spirits as security for the payment of the tax is quite unnecessary, as the language of the act is express to that effect; and sect. 3188 also provides that in case of such neglect or refusal the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person or on which the said lien exists, for the payment of the sum due with interest, and penalty for non-payment.

Nothing can be plainer in legal decision than the proposition that the lien in such a case attaches to the distillery, the distilled spirits, and to the real and personal property used in connection with the distillery, and that it may be enforced against the distilled spirits at any time before the purchaser of the same withdraws the spirits from the bonded warehouse, which is all that is necessary to decide in the case before the court. *Dobbins Distillery* v. *United States*, 96 U. S. 401.

Concede that the owner of the distilled spirits may sell the same while the spirits are deposited in the bonded warehouse, still his sale must be regarded as subject to the tax, as the purchase was in this case, which means that the purchaser takes the property subject to the lien in favor of the United States that is created by the act of Congress; nor is it any hardship upon the purchaser, as he as well as the distiller knows that the act of Congress makes it the duty of the commissioner to examine the monthly returns of the distiller, and that if he

finds that the distiller has not accounted for all the spirits produced, he must assess the delinquent for the excess produced beyond the amount reported.

Viewed in the light of that suggestion, it is clear that the purchaser has no just ground of complaint, as he knew that the spirits purchased under such circumstances were subject to such a corrected tax, and that the corrected assessment as well as that levied pursuant to the report of the distiller becomes a lien upon the high wines deposited in the bonded warehouse.

Judgment affirmed.

SMITH v. RAILROAD COMPANY.

1. The jurisdiction of the Federal courts cannot be affected by State legislation, and they will enforce equitable rights created by such legislation if they have jurisdiction of the subject-matter and the parties.
2. A., an alleged creditor of B., whose claim had not been established at law, filed his bill against the latter, averring him to be insolvent, and against C., a debtor of B., praying that the debt due from C. be applied to the payment of that claim. There being no assignment to A. by B. of his debt against C., and no lien upon the fund in the hands of the latter, — *Held*, that the bill could not be sustained.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Mr. Thomas G. Frost for the appellant.

Mr. J. E. McKeighan, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case was decided by the court below upon demurrer to the amended bill of the appellant. The case made by that bill, so far as it is necessary to state it, may be embodied in a few words.

The appellant and Dunn, under the name of Smith & Co., on the 6th of June, 1871, contracted with a corporation then known as the Fort Scott and Allen County Railroad Company, afterwards the Fort Scott, Humboldt, and Western Railroad

Company, to grade the line of its roadway, extending from Fort Scott, in Kansas, to Humboldt City, in the same State, and to build all the necessary bridges and culverts, and to complete the work by the 1st of July, 1872.

The railroad company, in consideration of the work to be done, agreed to pay and deliver to Smith & Co. certain municipal bonds, amounting, according to their face value, to $275,000; to wit, $125,000 in the bonds of Bourbon County, $25,000 in the bonds of Humboldt City, $75,000 in the bonds of Humboldt Township, $25,000 in the bonds of Salem Township, and $25,000 in the bonds of Elsmore Township. Dunn assigned his interest in the contract to Smith. The latter did all the work before the time specified. On the 6th of June, 1872, the railroad company passed a resolution accepting the work and acknowledging the fulfilment of the contract.

The bonds of Humboldt Township and Humboldt City, amounting together to $100,000, have been delivered to Smith pursuant to the contract. The bonds of Bourbon County and those of Salem Township and of Elsmore Township have not been delivered.

On the 24th of July, 1869, the commissioners of Bourbon County passed a resolution calling for an election on the 24th of August following, under a statute of Kansas, to decide the question whether the county should subscribe $150,000 to the capital stock of any railroad company then or thereafter organized to construct a railroad on the line specified in the contract of Smith & Co. The election was accordingly held at the time appointed. The result was in favor of the subscription. On the 13th of October, 1870, the Fort Scott and Allen County Railroad Company was duly organized. On the 13th of October, 1871, the commissioners of Bourbon County passed a resolution authorizing Joseph L. Emert to subscribe for $150,000 of the stock. The subscription was made accordingly. The county from time to time voted upon the stock. The commissioners resolved to prepare, and in part to execute, the bonds as soon as the necessary lithographing could be finished. They promised Smith promptly to deliver them upon the completion of the work within the contract time

They were present when the contract was entered into, and made the same promise to Smith & Co. But for their repeated assurances to this effect, and the reliance of both Smith and Dunn upon their good faith, the work would not have proceeded, and would not have been done.

The county bonds have not been issued, and new and burdensome terms have been imposed as conditions of that result. The railroad company is hopelessly insolvent. There is no remedy left to the appellant but to procure the bonds still in arrear. The prayer of the bill is that the railroad company be decreed to assign its claim for the bonds of Humboldt County to the complainant; that the county commissioners be decreed to issue them, and that process issue against the Fort Scott, Humboldt, and Western Railroad Company (formerly the Fort Scott and Allen County Railway Company), and against the county commissioners of Bourbon County and against that county.

The only question presented for our determination is whether the demurrer was properly sustained.

Our judgment will be confined to a single point.

There is no privity between the county of Bourbon and the complainant. There has been no assignment, legal or equitable, to him by the railroad company of its claim against the county. If there had been an assignment, the Circuit Court could not have taken jurisdiction of the case, because the assignor, if there had been no assignment, could not have maintained a suit upon the thing assigned in that forum. Rev. Stat. 109; *Sere* v. *Pitot*, 6 Cranch, 332. The relationship of the complainant to the company is that he is its creditor while the county is assumed to be, and perhaps is, its debtor. The complainant has no lien upon the fund he is seeking to reach. His case is, therefore, a common creditor's bill, — nothing more and nothing less. There is no statutory provision in Kansas touching such bills. The distinction there between legal and equitable remedies has been abolished. 2 Dassler's Statutes of Kansas, p. 643, sect. 3230.

The law of procedure there recognizes but two forms of action: one is designated a civil, the other a criminal action. The former relates to the assertion of civil rights by suit; the

latter, to criminal prosecutions. The Circuit Court of the United States of that district has, nevertheless, full equity jurisdiction. The Federal courts have it to the same extent in all the States, and State legislation cannot affect it. *Boyle* v. *Zacharie*, 6 Pet. 648. The States, however, may create equitable rights, which those courts will enforce where there is jurisdiction of the parties and of the subject-matter. *Clark* v. *Smith*, 13 id. 195; *Ex parte McNeil*, 13 Wall. 236. This bill, as regards this point, was well filed in the court to which it was addressed. But nothing is better settled than that such a bill must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery. *Wiggins* v. *Armstrong*, 2 Johns. (N. Y.) Ch. 144; *Hendricks* v. *Robinson*, id. 296; *Greenway* v. *Thomas*, 14 Ill. 271; *Mizzel* v. *Herbert*, 12 Miss. (Smed. & M.) 550; *Gorton* v. *Massey*, 12 Minn. 147; *Skele* v. *Stanwood*, 33 Me. 309; *Sexton* v. *Wheaton*, 1 Am. Lead. Cas. (5th ed.) 59.

There are exceptions to this rule, but they do not affect its application to the case in hand. It is, therefore, unnecessary to pursue the subject further.

Decree affirmed.

UNION PACIFIC RAILROAD COMPANY v. UNITED STATES.

1. The act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862 (12 Stat. 489), after providing for the issue of patents for land and of bonds to the Union Pacific Railroad Company and other companies from time to time, as successive sections of their respective roads should be completed, requires the companies to perform all government transportation of mails, troops, &c., and to credit the compensation therefor on the government loan; and then adds, that "after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." *Held*, 1. That the liability of the Union Pacific Railroad Company to make this payment accrued when it reported, and the President of the United States accepted, its road as completed, for the purpose of issuing the bonds, though the acceptance was provisional, and security was required that all deficiencies in construction should be supplied. 2. That the company having obtained the bonds and agreed in regard to the security, is estopped from denying that the road was then completed.
2. The "earnings" of the road include all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property "Net earnings," within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company.
3. The government bonds issued to the company were declared to be a first lien on the road and property; the act of July 2, 1864 (13 id. 356), authorized the company to issue an equal amount of first-mortgage bonds, to have priority over the government bonds. *Held*, that this priority authorized the payment of the interest accruing on these first-mortgage bonds out of the net earnings of the road, in preference to the five per centum payable to the government, which is only demandable out of the excess in each year.

APPEAL from the Court of Claims.

This is a suit by the Union Pacific Railroad Company to recover compensation for services rendered to the United States prior to 1874, and during a portion of that year 1874, and the whole of the year 1875. A counter-claim is set up for five per cent of the net earnings of the company, under the provision of the sixth section of the act of July 1, 1862 (12 Stat. 489), that "after the said road is completed, until said bonds and interest are paid, at least five per centum of the net earn-

ings of said road shall also be annually applied to the payment thereof." The United States alleges that the road was completed on the 6th of November, 1869, and that since that time a large amount of net earnings has been realized by the company, which it has failed to pay or apply to the said bonds. The company denies this, and alleges that its road was not finished until Oct. 1, 1874, and that it has not realized any net earnings in any year, since either the 6th of November, 1869, or the 1st of October, 1874; and denies that it was its duty to pay to the United States annually any money whatever, as and for five per cent upon its net earnings, to be applied in the manner aforesaid.

The Court of Claims decided that the road was completed on the 6th of November, 1869, and that the company did, after that period, annually realize net earnings to a large amount, for the six years from Nov. 6, 1869, to Nov. 6, 1875, amounting in the aggregate to the sum of $28,052,045.67; and that five per cent thereof, to wit, the sum of $1,402,602.28, was payable to the government; whilst one-half of the compensation due for the services rendered by the company to the government, for the period covered by the petition, amounted to only $593,627.10; and, therefore, that the government was entitled to recover from the company the difference between these two sums, amounting to the sum of $808,975.18. From this judgment the company appealed.

So much of the eighteenth finding by the Court of Claims as is referred to and commented on in the opinion of the court is as follows: —

A. — EARNINGS.

	Nov. 6, 1869, to Nov. 5, 1870.	Nov. 6, 1870, to Nov. 5, 1871.	Nov. 6, 1871, to Nov. 5, 1872.	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
7. Company freight earnings	$482,387.43	$362,414 58	$403,591.90	$465,734.02	$506,698.53	$657,641.99
22. Miscellaneous	116,300.14	94,610.20	112,920.09	140,039.31	218,942.15	166,696.94

B. — EXPENDITURES.

	Nov. 6, 1869, to Nov. 5, 1870.	Nov. 6, 1870, to Nov. 5, 1871.	Nov. 6, 1871, to Nov. 5, 1872.	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
1. Conducting transportation expenses	$829,771.15	$671,194.53	$746,950.28	$759,426.61	$760,646.38	$917,250.86
2. Motive-power expenses	1,778,601.44	1,229,048.51	1,681,610.17	1,754,271.78	1,585,962.21	1,811,629.48
3. Maintenance of cars expenses	608,622.90	302,225.09	367,584.14	436,332.64	429,562.89	567,566.25
4. Maintenance of way expenses	1,493,090.28	995,683.49	1,551,999.92	1,700,434.97	1,700,481.14	1,910,420.20
5. General expenses (including taxes)	445,119.88	367,651.07	353,556.19	363,976.69	405,813.19	446,519.19
6. Ferry expenses	54,714.88	.....	.....	.....	.....	.....
7. Deficiency in fuel and material account	75,577.54	.....	.....	.....	.....	.....
8. Legal expenses	85,508.81	48,807.41	57,698.94	12,852.55	25,246.43	53,016.88
9. United States revenue stamps	6,639.32	926.02	1,866.72	326.85	.....	.....
10. Salary account	16,355.90	53,522.39	28,725.86	24,886.69	54,218.19	32,750.83
11. Government directors	3,655.30	3,115.60	6,047.00	4,561.00	3,301.75	4,180.45
12. Government commissioners	2,391.15	.....	.....	.....	.....	722.40
13. Expense account	26,057.18	24,241.41	12,194.07	21,287.90	26,873.24	17,971.73
14. Telegraph earnings refunded	.....	.....	3,294.23	.....	.....	.....
15. Omaha bridge, expenses of operating	.....	.....	89,621.97	247,680.10	201,814.87	234,663.12
16. Car-service	.....	.....	.....	.....	21,780.78	.....
17. Discount and interest on floating debt	409,668.66	188,136.73	142,267.54	340,506.40	308,765.60	61,545.17
18. Expenses of land and town-lot departments	41,524.47	60,824.89	87,795.12	89,768.58	104,888.09	141,482.34
19. Taxes on lands and town lots	35,778.90	35,105.49	88,610.97	1,086.88	1,262.64	169,773.68
20. Interest on first-mortgage bonds	2,015,326.28	1,715,200.96	1,657,386.75	1,633,020.00	1,683,410.00	1,634,100.00
21. Interest on land-grant bonds	553,947.91	601,647.34	641,209.01	585,061.53	576,765.00	546,175.00
22. Interest on income bonds	673,238.41	882,306.95	935,550.00	935,641.06	778,348.00	450.00
23. Interest on sinking-fund bonds	.....	.....	.....	.....	157,912.00	1,021,388.88
24. Interest on Omaha bridge bonds	.....	.....	98,480.00	196,957.24	194,841.01	190,278.38
25. Premium on gold to pay coupons	.....	117,569.64	149,278.18	264,963.27	285,971.97	301,786.53
26. Construction of Omaha bridge	.....	.....	.....	24,334.25	4,390.00	.....
27. Expenditures for station buildings, shops, and fixtures, &c., as per statement attached	896,977.03	66,849.73	497,875.85	155,739.72	177,124.57	2,810.17
28. Requirements of sinking-funds for the redemption of funded debts:						
Omaha bridge bonds	.....	.....	38,000.00	41,000.00	44,000.00	47,000.00
Sinking-fund mortgage bonds	.....	.....	.....	.....	.....	144,000.00
29. Premium on Omaha bridge bonds redeemed	.....	.....	.....	12,218.00	10,752.50	12,513.32
30. United States interest half transportation accounts charged during the year	324,697.40	527,799.06	335,181.24	362,569.93	364,971.73	358,198.39
Total	$10,287,954.25	$7,942,755.88	$9,572,784.15	$9,968,854.70	$9,809,105.08	$10,628,208.16

DETAIL OF EXPENDITURES FOR STATION BUILDINGS, &c., CONSTITUTIN ITEM 27 ABOVE.

	Nov. 6, 1869, to Nov. 5, 1870.	Nov. 6, 1870, to Nov. 5, 1871.	Nov. 6, 1871, to Nov. 5, 1872.	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
1. Station buildings	$249,284.74	$48,286.40	$119,795.14	$14,580.61	.....	.....
2. Shops and fixtures	40,618.27	94,855.51	106,067.83	2,744.02	$1,718.32	.....
3. Equipment	109,933.13	.....	47,598.03	8,380.72	93,213.16	.....
4. Government commissioners	91.80	.....	.....	.....	.....	.....
5. Fencing	72,763.20	956.50	595.44	.....	.....	.....
6. Snow sheds and fences	260,147.90	5,787.67	116,770.54	66,969.23	.....	.....
7. Express outfit	7,136.41	.....	.....	.....	.....	.....
8. Engineering	13,980.99	11,899.75	8,247.96	162.87	.....	$2,510.17
9. Bridging	124,047.59	.....	.....	11,480.85	.....	.....
10. Car shops and sheds	12,938.06	6,661.96	23,284.63	1,020.26	.....	.....
11. Roadway and track	64,426.30	.....	31,885.19	16,550.09	.....	.....
12. Hotels	1,548.66	.....	.....	.....	.....	.....
13. Tenements	.....	15,759.26	40,775.37	463.86	.....	.....
14. Coal-sheds	.....	.....	2,905.70	11,006.63	.....	.....
15. Omaha depot buildings	.....	.....	.....	7,821.07	37,255.16	.....
16. Omaha general offices	.....	.....	.....	14,977.95	6,898.46	.....
17. Real estate	.....	.....	.....	.....	12,525.00	.....
18. Laramie rolling-mill	.....	.....	.....	.....	16,550.33	.....
19. Water-works	.....	.....	.....	.....	8,966.12	.....
	$896,977.03	$183,906.95	$497,875.85	$156,038.10	$177,124.57	$2,510.17
LESS RECEIPTS AND EXPENDITURES.						
20. Equipment	.....	111,430.40	.....	.....	.....	.....
21. Fencing	.....	.....	.....	298.38	.....	.....
22. Roadway and track	.....	5,626.32	.....	.....	.....	.....
	.....	$117,057.22	.....	$298.38	.....	.....
Totals of item No. 27	$896,977.03	$66,849.73	$497,875.85	$155,739.72	$177,124.57	$2,510.17

Items 5, 6, 7, 8, 9, 10, 11, 12, 14, and 15 are not in dispute.

Item 1, "conducting transportation expenses," is liable to be reduced by the amounts shown in line 1 of the table below as expended for "tenement-houses and hotels," and by the amounts shown in line 2 as expended for new station-buildings; item 2, "motive-power expenses," is liable to be reduced by the amounts shown in line 3 as expended for "engine-equipment," and by the amounts shown in line 4 as expended for "tanks and water-works;" item 3, "maintenance of cars expenses," is liable to be reduced by the amounts shown in line 5 as expended for "car-equipment;" and item 4, "maintenance of way expenses," is liable to be reduced by the amounts shown in line 6 as expended for the "Laramie rolling-mills," in case such several and respective outlays are regarded as not

proper to be deducted from "gross earnings" in order to arrive at "net earnings."

	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
1. Tenement-houses and hotels	.....	$1,659.96	$21,229.53
2. New station-buildings	$6,909.98	18,146.77	78,589.57
3. Engine-equipment	.....	25,396.69	63,277.70
4. Tanks and water-works	.....	734.99	12,450.13
5 Car equipment	.....	3,600.00	206,930.36
6. Laramie rolling-mills	.....	43,716.01	149,859.30

Item 13, "expense account," is subject to be reduced by the following amounts in case such outlays are regarded as not proper to be deducted from "gross earnings" in order to arrive at "net earnings;" viz., In the year, Nov. 6, 1869, to Nov. 5, 1870, expenses relating to an issue of bonds, $10,339.76; March 13, 1871, cost of a plate for the bridge bonds, $1,500; June 5, 1874, and expense relating to the issue of sinking-fund bonds, $6,579.10.

The disputed expenditures in items 1, 2, 3, and 4 were for new construction. Item 27 was also for new construction.

Item 16 was for the use of the cars of other companies.

Items 17, 20, 21, 22, 23, 24, and 25 show payments of interest on debts.

Items 18 and 19 show payments made on account of the land department of the company's business.

Item 26 shows payments in the construction of the Omaha bridge above the amounts received from the sale of the mortgage bonds secured by it.

Items 28 and 29 show expenditures made for a sinking-fund for the redemption of the company's debt.

Item 30 shows an assumed payment of a portion of the interest on the government subsidy bonds by the application to it of half the government transportation account.

Mr. Sidney Bartlett for the appellant.

The Attorney-General and *Mr. Joseph K. McCammon, contra.*

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

This case is in some respects supplemental to that of *United*

States v. *Union Pacific Railroad Co.*, 91 U. S. 72. That was a suit brought in the Court of Claims, by the company, to recover one-half of the compensation due to it for services rendered to the government between the dates of February, 1871, and February, 1874, against which claim the United States set up a counter-claim for the interest which it had paid on the subsidy bonds advanced to the company. This court held that, by the terms of the acts of Congress granting said subsidies, the company was not required to pay the interest on said bonds until the maturity of the principal thereof; and therefore the counter-claim of the government was overruled. The present case arises upon a like suit brought by the company in the Court of Claims for the recovery of one-half of the compensation due to it for services rendered to the government during the remainder of the year 1874 and the whole of the year 1875, including certain services performed prior to 1874, not included in the first suit.

The general history of the legislation of Congress in reference to the Union Pacific Railroad Company and the associated enterprises, and of the policy of the government respecting the same, is fully stated in our opinion in the former case, and need not be repeated here. We shall only advert to the several acts, and to the proceedings and negotiations which have taken place between the parties, so far as may be necessary to an understanding of the specific questions which are raised in this suit. The facts are fully set forth by the Court of Claims in its findings. Three principal questions are raised by the acts of Congress and the facts found by the court, which it is necessary for us to determine.

First, When was the road completed?

Secondly, What is included in net earnings?

Thirdly, How and under what conditions are they to be paid?

I. First, as to the completion of the road.

In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail, or iron bar, laid on wooden

string-pieces, resulting in what was known, in former times, as snake-heads — the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail; and finally the H rail, which itself passed through many successive improvements. Finally, steel rails in the place of iron rails have been adopted as the most perfect, durable, safe, and economical rails on extensive lines of road. Bridges were first made of wood, then of stone, then of stone and iron. Grades originally crossed, and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over, or under, intersecting roads. A single track is all that is deemed necessary to begin with; but now, no railroad of any pretensions is considered perfect until it has at least a double track. Depots and station-houses are at first mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first-class railroad; and if a question of right or obligation between parties depends upon the completion of such a structure, courts are obliged to spell out, from the circumstances of the case, and the language and acts of the parties, what they mean when they use such terms.

In the present case, we have for our guidance several clauses in the charter of the Union Pacific Railroad Company (the act of 1862), in which the terms referred to are used, as well as the acts of the parties in reference thereto. One of these clauses is in the fourth section of the act, which contains an engagement on the part of the government to grant certain sections of land to the company on the completion of a certain number of miles of its road. The third section having granted to the company every alternate section of the public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the railroad, on the line thereof, and within the limits of ten miles, not otherwise disposed of by the United States, the fourth section proceeds as follows: —

"SECT. 4. That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. . . . *Provided, however*, that no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end, which oath shall be taken before a judge of a court of record."

By the act of 1864 (13 Stat. 356), the amount and extent of the grant is doubled.

Again, by the fifth section of the act of 1862 it is enacted as follows:—

"SECT. 5. That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of $1,000 each, payable in thirty years after date, bearing six per centum per annum interest, . . . to the amount of sixteen of said bonds per mile for each section of forty miles, and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States,

the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued."

By the eleventh section the amount of bonds granted was to be $48,000 per mile for one hundred and fifty miles through the Rocky Mountains, and for the same distance including the Sierra Nevada Mountains, and $32,000 per mile between those points; and by the act of 1864 the completed sections were reduced to twenty miles instead of forty.

By the sixth section of the act it is further enacted as follows: —

"SECT. 6. That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores, upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par, *and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.*"

Reading these sections together, it seems hardly possible to conceive that the word "completed," in the last clause of the sixth section, has any other or different meaning from that which it has in the fourth and fifth sections; or that the five per cent of the net earnings should not be demandable by the government as soon as the whole line was completed in the same manner in which any forty [or twenty] miles was to be completed in order to entitle the company to bonds. This con-

clusion is so obvious and self-evident that it hardly needs a word of argument to maintain it.

Now, the findings of fact show that the company began to claim the subsidy of lands and bonds for completed sections of the railroad and telegraph line in June, 1866; and from that time forward made similar successive applications nearly or quite every month, tendering the affidavit of the president of the company as to the completion of the several sections, as required by the act. The first of these affidavits was made on the 25th of June, 1866, and was in the words following: —

"John A. Dix, being duly sworn, deposeth and saith, that he is president of the Union Pacific Railroad Company, and in pursuance of the requirements of sect. 4 of the act of Congress approved July 1, 1862, entitled 'An Act to aid in the construction of the railroad and telegraph line from the Missouri River to the Pacific Ocean,' &c., he now states, under oath, that one hundred and five consecutive miles of said railroad, beginning at Omaha and ending at a point one hundred and five miles westward thereof, on the line designated by the maps of said company on file in the Department of the Interior, have been completed and equipped in all respects as required by the act referred to, as he is informed by the engineer charged with the construction of said line, and as he verily believes to be true; and he further states, under oath, that one hundred and five miles of telegraph have been completed for the said one hundred and five consecutive miles, as he is also advised by the engineer in charge.

"JOHN A. DIX, *President.*

"Sworn to, June 25, 1866."

The last affidavit, relating to the completion of the last section of the road (and indeed extending some fifty miles beyond the point of division finally agreed upon between the Union and Central Pacific Railroad Companies), was made on the 18th of May, 1869, and was in the words following: —

"Oliver Ames, being duly sworn, deposeth and saith that he is president of the Union Pacific Railroad. And in pursuance of the requirements of sect. 4 of the act of Congress approved July 1, 1862, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean,' &c., he now states, under oath, that another section of eighty-six miles, commencing at 1,000 mile and ending at 1,086 mile-post, was completed on the tenth

day of May, 1869, making in all 1,086 consecutive miles of said road, beginning at the initial point on section 10, opposite western boundary of the State of Iowa, as fixed by the President of the United States, and ending at a point 1,086 miles westward therefrom on the line designated by the maps of said company on file in the Department of the Interior, that have been completed and equipped in all respects as required by the act referred to, as he is informed by the engineer charged with the construction of said line, and as he verily believes to be true. And he further states, under oath, that 1,086 miles of telegraph have been completed for the said 1,086 consecutive miles, as he is also advised by the engineer in charge.

"OLIVER AMES,
"*President Union Pacific Railroad Company.*

"Sworn to, May 13, 1869."

The Court of Claims finds as a matter of fact that "on the 10th of May, 1869, the last rail of the claimant's road was laid, and about a week afterwards the road was opened over the entire length to public use for the transportation of passengers and freight, and for the service of the government; and this service was from that time forward performed continuously."

It further found that on the 23d of December, 1865, the President of the United States, under the authority of sect. 4 of the said act of July 1, 1862, appointed commissioners to examine and report upon the first section of forty miles of said road; and some time prior to April 30, 1866, he appointed other commissioners to examine and report upon the second section of twenty-five miles of said road; and after the making of each of the foregoing affidavits, he appointed other commissioners to examine the sections of the road as successively completed, and report to him in relation thereto. The reports of the commissioners so appointed were made in the first instance to the Secretary of the Interior, who transmitted them to the President, who approved the recommendations of the Secretary of the Interior by writing his approval thereon. The following is the first letter of the said secretary, with the President's indorsement thereon: —

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Jan. 24, 1866.

"SIR, — I have the honor to submit herewith enclosed, for your action, the report of the commissioners appointed by you on the 23d

December, 1865, to examine the first section of forty miles of the Union Pacific Railroad, extending west from the city of Omaha, Territory of Nebraska. The company authorized to build this road having, as shown in the report of the commissioners, obligated itself to remedy, within a reasonable time, the deficiencies in the construction of said section, I respectfully recommend that the same be accepted, and proper steps be ordered for the issue of the bonds and land-grants due the company agreeably to law.

"I am, sir, with much respect, your obedient servant,

"JAS. HARLAN, *Secretary.*

"THE PRESIDENT."

"EXECUTIVE MANSION, Jan. 24, 1866.

"The within recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

"ANDREW JOHNSON."

Similar reports were made by the Secretary of the Interior, as the successive sections were completed and reported on by the commissioners, down to and including the ninth day of February, 1869, and were severally approved by the President; and the company received the subsidy bonds of the government in accordance therewith.

As it appeared by the reports of some of the commissioners that the several sections of road were not, and could not, under the circumstances be, fully completed up to the ultimate standard of a first-class railroad, though they might be, and actually were, completed, section by section, so as to admit of transportation and travel over the same, the railroad company, on the 12th of February, 1869, being thereto required by the Attorney-General of the United States, as a guaranty for the ultimate full completion and equipment of the road, executed an agreement of the last-mentioned date to deposit in the Treasury Department their own first-mortgage bonds (which by the act of July 2, 1864, they had been authorized to issue, and which were to be preferred to the lien of the United States) to the amount of $8,000,000, to be held by the government as security for the completion of the road according to the provisions of the statutes in that behalf, and until the President, on a proper examination of the same, should be satisfied that it was so com-

pleted. At the same time, the company also agreed, by way of further security, to leave their land-grants with the government, without taking out patents for the same, until the President should be satisfied as aforesaid, — or *pro tanto* to such extent as he might not be satisfied.

On the 10th of April, 1869, a joint resolution was passed by Congress, by which, amongst other things, it was declared that the common terminus of the Union Pacific and the Central Pacific railroads should be at or near Ogden. And that the President was thereby authorized to appoint a board of eminent citizens, not exceeding five in number, to examine and report upon the condition of the two roads (the Union Pacific and the Central Pacific), and what sum, if any, would be required to complete each of them. And the President was further authorized and required to withhold from them an amount of subsidy bonds sufficient to secure the full completion of the roads as first-class roads, or to receive an equal amount of the first-mortgage bonds of the companies. A board of five eminent citizens was appointed under this resolution in the month of August following.

In the mean time, two additional reports were made by the Secretary of the Interior to the President, one on the 27th of May, 1869, and the other on the 15th of July, 1869, in each case recommending the acceptance of the sections referred to therein, and also recommending the issue of bonds therefor, in accordance with the agreement aforesaid, to the effect that the company should deposit its first-mortgage bonds with the Secretary of the Treasury to such amount as might be deemed necessary to secure the ultimate completion of the road.

The last of these reports, with the President's indorsement thereon, is in the words following, to wit: —

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 15, 1869.

"Sir, — I have the honor to transmit herewith, for your action, five reports, dated the 9th ultimo, of the commissioners, Messrs. Gouverneur K. Warren and James F. Wilson; also the report of Isaac N. Morris, the other commissioner, dated May 28, 1869, appointed by you to examine and report upon a section of 85 $\frac{11}{100}$ miles of the road and telegraph line, constructed by the Union

Pacific Railroad Company, commencing on the road of said company at the 1,000th mile-post west from Omaha and terminating at the $1,085\frac{88}{100}$ mile-post.

"The majority of said commissioners, in their report, represent the said section of $85\frac{88}{100}$ miles ready for present service, and completed and equipped as a first-class railroad, and that the telegraph line is completed for the same distance; and as the company have paid the per diem and mileage due them under the twenty-first section of the act of Congress approved July 27, 1866, on account of their examination of said section of road and telegraph line, I therefore respectfully recommend the acceptance of the same and the issue of bonds and of patents for land due on account of said section, agreeably to the act approved July 1, 1862, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' and the acts amendatory thereof. Said bonds and patents to be issued to the Union Pacific Railroad Company on account of the work from said 1,000th mile-post to the 'common terminus of the Union Pacific and Central Pacific Railroads,' 'at or near Ogden;' and the bonds and patents on account of said work from said common terminus to Promontory Summit to be issued to such company as the proper authority, after full investigation of the respective claims of the Union Pacific Railroad Company and the Central Pacific Railroad Company of California shall determine to be thereunto lawfully entitled: *Provided, however*, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned in my letter to you of the 27th of May last.

"I am, sir, very respectfully, your obedient servant,

"J. D. COX, *Secretary.*

"THE PRESIDENT."

"EXECUTIVE MANSION, July 15, 1869.

"The within recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

"U. S. GRANT."

It is found by the Court of Claims that on the 22d of July, 1869, in partial performance of this last order of the President, $640,000 of subsidy bonds were issued to the company, being

the subsidy for the section of twenty miles extending from the 1,000th to the 1,020th mile from Omaha, the subsidy bonds on all the previous sections having been received by the company before that time.

As before stated, in August, 1869, the President, in accordance with the joint resolution of April 10, 1869, appointed a board of five eminent citizens, to examine and report upon the condition of the road, and what sum would be required to complete it as a first-class railroad. This board made a detailed examination, and on the 30th of October, 1869, made an elaborate report, specifying a number of particular things at various points, such as ballasting, embankment, masonry, trestle-work, &c., which required perfecting to put the road in first-class condition; estimating the aggregate expense of such improvements on the whole line from Omaha to Ogden at $1,586,100. They conclude their report as follows: "This great line, the value of which to the country is inestimable, and in which every citizen should feel a pride, has been built in about half the time allowed by Congress, and is now a good and reliable means of communication between Omaha and Sacramento, well equipped, and fully prepared to carry passengers and freight with safety and despatch, comparing in this respect favorably with a majority of the first-class roads in the United States."

This report being made and accepted, on the 3d of November, 1869, the Secretary of the Interior issued directions to the Commissioner of the General Land-Office to commence patenting lands to the companies, and to issue patents for one half of the lands which they were to receive, — the patents for the other half to be suspended until further directions, in addition to the bonds retained, as security for the completion of the roads in the matters reported deficient or not up to the standard by the said committee.

Up to the 6th of November, 1869, the point at which the Union Pacific and Central Pacific roads should meet was not settled; but assuming that the former would go no further west than Ogden, $1,033\frac{68}{100}$ miles from Omaha, the Secretary of the Treasury on that day ordered that bonds at the rate of $32,000 per mile for the distance of $13\frac{68}{100}$ miles from the

1,020th mile-post to Ogden should be issued, but ordered that the register of the treasury should hold $323,488 thereof as security for the over-issue of first-mortgage bonds by the company, and deliver the balance to it. The reason of withholding these bonds was, that the company, having been authorized by the act of July 2, 1864, supplementary to its charter, to issue the same amount of first-mortgage bonds as it was entitled to receive from the government, and which was accorded a priority over the lien of the government bonds, and having actually constructed the road fifty-three miles west of Ogden, had issued a larger amount of its own bonds than the amount of subsidy to which it was entitled as the point of division between its road and that of the Central Pacific was finally settled. By a subsequent arrangement with the Central Pacific Railroad Company, the point of junction between the two roads was fixed at a point five miles west of Ogden, which entitled the Union Pacific Company to bonds for such five additional miles, amounting to $160,000, which it received in July, 1870, making the total amount of subsidy bonds which it was entitled to, and did receive, the sum of $27,235,760.

It thus appears that prior to the sixth day of November, 1869, the entire road of the company had, in separate sections, been reported by it, under the oath of its president, as being completed and furnished as a first-class railroad, in accordance with the requirements of the act, and that upon the strength of these representations, and the corresponding reports of the commissioners appointed to examine the several sections, it had been accepted by the President; and that the company, with the exception of the last $160,000 of bonds, the claim to which arose from a mutual arrangement between the two companies, had received its entire subsidy of government bonds; and had received an order for the issuing of patents for its grant of public lands to the extent of one half thereof; the patents for the other half being suspended, by virtue of the agreement made in April, 1869, as security for the more perfect completion of certain parts of the work.

It is urged that the acceptance of the road by the President up to this period was only provisional, and not final. We cannot perceive that this makes any difference. It was an

acceptance by which the company was enabled to receive its subsidy of government bonds; and was sought by it in order that it might obtain them.

It seems to us unnecessary to look further, or to review the subsequent proceedings which took place between the President and the company, in reference to the fulfilment of the conditions by the latter, on which the issue of the patents for the remaining lands depended. It appears that another commission was appointed to examine the road in 1874, and that, on their report, the President was satisfied that all the imperfections, as a security for the removal of which any patents had been suspended, were removed. The company insists that this was the period which should be taken for the completion of the road in reference to the payment of five per cent of its net earnings, — a period five years after it had reported the last section completed according to the act of Congress, and after the President, by virtue of the agreement aforesaid, had consented to accept it as completed for the purpose of enabling the company to draw its subsidy of government bonds, and after it had received said bonds.

Can a stronger case of estoppel than this well be presented? The plea that the government still retained a portion of the public lands which the company was to receive, as security for the supply of certain deficiencies in the road, cannot avail to diminish the strength of the estoppel. This was done by the voluntary agreement of the company itself. And as, by making this concession, it succeeded in obtaining the formal acceptance of its road for the sake of the benefit to accrue therefrom, to wit, the procurement of the subsidy bonds, the company ought to be willing to bear the burden of such acceptance, to wit, the payment annually of five per cent of the net earnings of the road on account of the bonds. It would be an unfair construction of the acts of the parties under the law, to hold that the road was completed for one purpose and not for the other. We think, therefore, that the Court of Claims was right in deciding that the road was completed on the sixth day of November, 1869, so far as the duty of the company to account for five per cent of its net earnings is concerned.

II. The question next arising is, What are the "net earn-

ings" for five per cent of which the company became liable to account, and in what manner are they payable?

In the first place, they are the "net earnings of the road;" that is, the net earnings of the road as a railroad, including the telegraph. They have nothing to do with the income or profits of the company as a holder of public lands. The proceeds of this source of income are no part of the earnings of the road. These earnings, however, must be regarded as embracing all the earnings and income derived by the company from the railroad proper, and all the appendages and appurtenances thereof, including its ferry and bridge at Omaha, its cars, and all its property and apparatus legitimately connected with its railroad.

In the present case, but little difficulty is presented in determining what are the proper earnings of the road, except in one particular. The company insists that the compensation accruing to it for services performed for the government, under the sixth section of the act of 1862, should not be estimated amongst the earnings of the road, in taking an account of net earnings upon which to calculate the five per cent in question. That compensation is not receivable by the company, — does not come into its hands, — at least was not receivable by it according to the act of 1862, but was directed by the sixth section to be applied to the payment of the subsidy bonds. After giving this direction, the section proceeds to add, that after the road is completed, "until said bonds and interest are paid, five per centum of the net earnings of said road shall also be annually applied to the payment thereof." It is contended that the net earnings here referred to are intended to be exclusive of said compensation for government service, no part of which the company was to receive. It must be admitted that there is some force in this view. But the majority of the court is of opinion that the plain letter of the statute cannot be thus varied by construction. The compensation accruing by means of services performed for the government is unquestionably earnings of the road and telegraph; and as there are no words in the act which go to show any intention to except this portion of earnings from the other earnings of the road in estimating the amount of net earnings, the conclusion arrived at is, that no

such exception can be made. The fact that by a subsequent law the company is allowed to receive in money one-half of the compensation referred to, removes to a great extent the practical difficulties that have been suggested in this behalf.

There is another item in the table of earnings set forth in the eighteenth finding of the Court of Claims which may require consideration. We refer to the seventh item, entitled "company freight." If this means freight for the transportation of the company's own property over its own road, it ought not to be put down as a receipt, unless the same amount is also embraced amongst the expenses on the other side of the account. How this fact may be we have not before us the means of knowing. The evidence which the Court of Claims has in its possession will enable it to determine this matter. We merely decide that if the item appears only as a receipt or earning, and is of the character we have supposed, it ought to be excluded from the account.

Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earning in order to arrive at the "net earnings," as this expression is to be understood within the meaning of the act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last-mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every

item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is, to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the despatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes; but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed. We think that the true interest of the government, in this case, is the same as that of the stockholders; and will be subserved by encouraging a liberal application of the earnings to the improvement of the works. It is better for the ultimate security of the government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails, that a hundred dollars should be spent in improving the works, than that it should receive five dollars towards the payment of its subsidy. If the five per cent of net earnings, demandable from the company, amounted to a new indebtedness, not due before, like a

rent accruing upon a lease, a more rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The amount of the five per cent and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the government loses nothing thereby. The only result is, that a less amount is presently paid on its debt; whilst the general security for the whole debt is largely increased.

We are disposed to agree, therefore, with the judge who delivered the concurring opinion in the court below, that the twenty-seventh item of expenditure, as stated in the table of expenses in the eighteenth finding, entitled "expenditures for station buildings, shops, &c.," is a charge that may properly be made against earnings, since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account. Should the company ever attempt to make a stock or bond dividend in consideration of such expenditure, the government would be entitled to demand its due proportion thereof by way of payment on account of its debt. But as long as such expenditures are fairly and in good faith charged to account of earnings, we see no good reason for disallowing the charge.

Of course, the allowance of this item will supersede the deduction of fifteen per cent from the seventh item of earnings; which item, however, is subject to the observations that have already been made upon it.

Expenses of the same kind as those included in item 27, which are contained in other items, and were disallowed by the Court of Claims, are to be allowed in like manner as those in item 27, including the expenses for issuing bonds.

We agree with the Court of Claims in its rejection of the expenditures contained in items 17 to 30 in the table referred to, excepting item 27. All payments of interest on the bonded indebtedness of the company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, they cannot be deducted for the purpose of ascertaining the "net earnings" of the road, as that term is to be

understood in the sixth section of the act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital. It has nothing to do with, and cannot affect, the amount of the net earnings of the road.

So the expenses of land and town-lot departments, and taxes on lands and town lots, are expenses properly belonging to the land department of the company's property. They are entirely distinct from its expenses as a railroad company; and form no proper charge, in the accounts, against the earnings of the road.

The other items disallowed by the court require no particular remark. Their irrelevancy in the account of net earnings is obvious.

III. We have still to consider the manner in which, and the conditions subject to which, the five per cent of net earnings is payable and demandable.

We have seen that by the fifth section of the act of 1862 the issue to the company of the subsidy bonds was to consti tute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, [and] in consideration of which said bonds should be issued. By the act of July 2, 1864, this priority of the government claim was relinquished in favor of a certain amount of first-mortgage bonds which, by that act, the company was authorized to issue. The provision referred to is contained in the tenth section of the act of 1864, which is as follows: —

"SECT. 10. And be it further enacted, that sect. 5 of said act [of July 1, 1862] be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the

bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States."

It is found by the Court of Claims that the Union Pacific Railroad Company did issue its first-mortgage bonds as authorized by this section, and to the full amount allowed thereby. The company contends that the interest of these bonds, if not its other interest, should be charged as an expenditure against the earnings of the road in taking an account of its net earnings, which would reduce the net earnings of each year by the amount of said interest. We have already expressed an opinion that this claim cannot be sustained. The interest on these bonds do not, any more than the interest of any other bonds of the company, form any proper portion of the expenditures of the road to be considered in estimating the net earnings mentioned in sect. 6 of the act of 1862.

But whilst we decide against the company on this point, we are clearly of opinion that the annual interest accruing on these particular bonds are to be first paid out of the net earnings, before the government can demand its five per cent thereof. We conceive this to be the legitimate effect of the concession by the government of its priority. It can hardly be pretended that, notwithstanding this concession, the five per cent to be applied in payment of the government bonds is to be first paid. It seems to us an absurdity to say that these bonds are entitled to a priority, but that the government must be first paid. This would be to grant a priority, and, in the same breath, to take it back again. It will not do to say that both must be paid, if there is not enough to pay both. It is a question between two parties having a claim against a common fund, and one of them having a priority over the other.

It may, perhaps, be urged that the first-mortgage bondholders have no lien on the net earnings. But it has the same lien

that the government has. Both liens are coextensive with the whole property of the company, so far at least as relates to the railroad and telegraph lines and their equipment and all property appurtenant thereto. There is a direction, it is true, that if the company makes net earnings, it shall pay five per cent thereof on its debt to the government. But that direction was contained in the act of 1862; the authority to issue the first-mortgage bonds, and the concession of priority thereto, was given two years afterwards, and is the controlling enactment. It cannot be supposed, after this transaction, that the company is bound to pay the government first, and to allow the interest on the first-mortgage bonds to go unpaid, or, in order to pay it, to go out in the money market and make a new loan. Such could never have been the intention of the law. Not to pay the interest on the first mortgage would expose the road and works to be seized and sold, — a result, certainly, that could not be to the interest of the government, when we consider that its entire debt is postponed to the first mortgage, and would be liable to be lost by such a proceeding. Borrowing money to pay the interest (if it could be borrowed) would only be to put off the evil day.

The interest accruing on the first mortgage is as much payable out of the net earnings as the five per cent payable to government is. It is the proper fund out of which to pay both; and if but one can be paid, the former has the precedence; or else the whole government debt might be paid to the exclusion of the first mortgage, which is admitted to have the priority. Such a result would be manifestly absurd.

The truth is, that the provision for paying five per cent of the net earnings on the subsidy debt was a provision for payment out of a particular fund. If by voluntary agreement on the part of the government a portion of that fund is appropriated to another purpose (which we think it is), then the government is entitled to go against the balance only. The provision created no new obligation or indebtedness, but only entitled the government to anticipate part payment of a fixed indebtedness out of a particular fund, if there should be such a fund. If the fund should not arise, or should be exhausted by claims to which the government gave priority over its own

claim, there would clearly be nothing for the government to demand.

It is not like the case of two mortgages, one prior to the other, and both having claims for interest coming due. In such case, if both claims are not paid, the one which is not paid becomes a cause of action, and may be put in suit. Here, the claim of the government is on the fund alone. If that is exhausted by its own consent, no cause of action arises. There is simply nothing left of the fund to which it has a right to resort.

The government, however, may contend that if there is not a sufficient surplus of net earnings in one year to pay the five per cent due for that year, it may be carried over to a succeeding year, and taken out of the surplus thereof. We do not think that this position is more tenable than the other. Each year is to stand by itself. If there is a deficit in any year instead of net earnings, such deficit cannot be carried over into the next year's accounts by the company; and if there are net earnings which are absorbed by the interest due on the first mortgage, the claim of five per cent cannot be carried over into the next year by the government. The one is no more a debt than the other is a credit. The statute makes the application an annual one. If the year produces net earnings sufficient for the purpose, the government gets its five per cent; if it does not produce sufficient, the government does not get its five per cent; and there the account ends for that year. It was never intended that this account should be carried on from one year to another.

This seems to us to be the fair and reasonable construction of the statutes, and one that does no injustice to either of the parties. The object of Congress in all of them was to extend a liberal hand in aid of the enterprise which the company undertook to carry out, and not to exact, in addition to the amount of service which the company was required to perform, the payment of any part of its loan before maturity, except a small portion of the net earnings of the road which the company would be presumed to have in its hands. So far as these were otherwise disposed of by the government's own consent, the application to its debt must be regarded as intended to be waived.

The fact that by the ninth section of the act of March 3, 1871 (16 Stat. 525), the Secretary of the Treasury is required to pay over in money to the companies one-half of the compensation for the services performed by them for the United States, has no bearing on the question now under consideration. The statutes out of which this question arises were all passed long before, and are to be construed as if the act of 1871 had never been passed.

We may add, in conclusion, that Congress, by the act passed May 7, 1878 (20 Stat. 56), supplementary to the acts of 1862 and 1864, has expressly directed that, in estimating the net earnings of the roads, the interest of the first-mortgage bonds, as well as the current expenses, is to be deducted from the gross earnings. Whilst this enactment cannot be invoked as furnishing any decisive rule for the construction of the statutes under review, it at least shows that Congress deems the interest of said first-mortgage bonds as fairly entitled to priority of payment out of the earnings of the road, before the payment of any portion thereof on the government debt. We think, therefore, that we are justified in supposing that our conclusion is in harmony with the views of the legislature, as to the justice and right of the case.

The conclusions to which we have come on the whole case will require the following modifications of the decree appealed from:—

First, In estimating the amount of gross earnings, no deduction will be made from the earnings included in items 7 or 12, as set forth in the table contained in the eighteenth finding of the Court of Claims, unless it be found that item 7, entitled "company freight," is for transporting the company's own property on its road, and is not balanced by being also contained among the expenditures. If this be the case, then the whole of item 7 should be struck out.

Secondly, In estimating the amount of expenditures to be deducted from gross earnings, the claimant should be credited with the expenditures contained in item 27 of the table of expenditures, and the other expenses which are disallowed by the Court of Claims, except items 17 to 26 inclusive, and items 28, 29, and 30, which are properly disallowed.

Thirdly, If with these modifications it should be found that the net earnings, in any one year, were not more than sufficient to pay the interest on the first-mortgage bonds accruing in said year, then the company will not be decreed to pay any portion of the said five per cent of net earnings for that year. But if the net earnings were more than sufficient to pay said interest, the excess will be subject, as far as it will go, to the payment of said five per cent; but the company will not be decreed to pay any more than said excess.

The decree will be reversed with instructions to enter a decree in accordance with this opinion; and it is

So ordered.

MR. JUSTICE STRONG, with whom concurred MR. JUSTICE HARLAN, dissenting.

I concur with the majority of the court in holding that the railroad was completed, within the meaning of the sixth section of the act of 1862. on the sixth day of November, 1869. I concur also in the definition of "net earnings," as the term was used in that section. But the majority now express the opinion that if the net earnings in any one year are not more than sufficient to pay the interest on the first-mortgage bonds of the company in that year, the United States is not entitled to any portion of five per cent of those earnings for that year, though, if they are more than sufficient to pay that interest, the excess or surplus is subject, so far as it will go, to the payment of the five per cent. This is substantially holding that the claim of the government to the annual payment of five per cent of the company's net earnings, after the completion of the road, is postponed to the annual interest on the first-mortgage bonds. To this I cannot assent. It is, I think, based upon an entire misconstruction of the acts of Congress which gave existence to the company, and to which alone we can look for the contract between it and the government. A very few words will indicate my opinion, and show the reasons upon which it rests. By the fifth section of the act of 1862, the Secretary of the Treasury was required to issue to the company bonds of the United States to an amount therein specified. The bonds were to be issued as a loan, and the section provided as follows:

"And to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued." This clause describes the lien, and the only lien, reserved by the United States. It covers the railroad and telegraph, the rolling-stock and fixtures, and property of every kind and description. It does not cover income from the property, either gross receipts or net receipts derived from its use, while it remains in the possession of the company and before any forfeiture for breach of the conditions of the mortgage. A mortgage of a property is a very different thing from a mortgage of its income. The mortgagor, so long as he remains in possession, or until actual entry by the mortgagee, may receive the rents and profits to his own use, and is not accountable for them to the mortgagee. *Fitchburg Cotton Manufactory Corporation* v. *Melven et al.*, 15 Mass. 268; *Boston Bank* v. *Reed et al.*, 8 Pick. (Mass.) 459. Indeed, it is clear law that a mortgagee has no specific lien upon the rents and profits of mortgaged premises until condition broken. *The Bank of Ogdensburgh* v. *Arnold and Others*, 5 Paige (N. Y.), 38. I think it very apparent that in the reservation of the lien Congress did not intend to interfere with or assert rights over the earnings of the railroad, or to prevent their appropriation to the general uses of the company. They were not intended to be covered by the lien, or embraced within it. And I am confirmed in this belief by the fact that, immediately following the clause in the fifth section describing the lien, a right was reserved to the United States to take possession of the road on failure of the company to redeem the bonds loaned.

Assuming that I am correct in this, I pass to the sixth section of the act, which makes no reference to the lien, though it imposes duties upon the company. It enacts that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and tele-

graph in repair and use, shall transmit despatches at all times over said telegraph line, and transport mails, troops, &c., for the government when required, giving to the government the preference in the use of the road and line for all the purposes aforesaid. The section then declares that all compensation (subsequently changed to one-half thereof) for services rendered for the government shall be applied to the payment of the bonds and interest, so as aforesaid named, until the whole amount is fully paid. Then follows the clause which the United States is seeking in this action to enforce. It is as follows: "And after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." The grants referred to in this section, and declared to be conditional, are probably those of the right of way and alternate sections of land given previously in the preceding sections. They can hardly refer to the loan of bonds. This, however, is not very material. While it is true that the section refers to payment of the debt due to the United States, it contains no allusion to the lien for the security of the debt reserved in the fifth section. And it can hardly be pretended that performance of the duties thereby imposed upon the company is secured by the statutory mortgage. The mortgage is not a security for having the road and telegraph kept in order, nor for the transmission of despatches, or the transportation for the government, nor for priority of use by the government, nor for the application to the payment of the bonds of half the compensation for services to the government. Nor is it any more a security for the required payment of a percentage of the net earnings. These duties are secured by the condition attached to the land grants, and by the implied assumption of the company. They are entirely collateral to the obligation and lien of the mortgage. They are not a part of it. It is no uncommon thing that a creditor has several securities for one debt. He may have a bond and a mortgage to secure its payment; he may have also a promissory note, or an assignment of stock. Nobody would claim that in such a case the note and the assignment are included in the lien of the mortgage.

Having thus shown, as I think, what the lien of the govern-

ment was, what it covered, and what it did not, I pass to the tenth section of the amending act of 1864, by which, as construed by a majority of the court, the claim of the United States to a percentage annually of the net earnings of the road, is postponed to the rights of what is called the first mortgage of the company. That section authorized the company, and other companies, to issue their first-mortgage bonds on the *roads and telegraph lines* to an amount not exceeding the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to them. It then declared thus: "And the lien of the United States shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches, and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States."

The first mortgage thus authorized was less comprehensive than the statutory mortgage of the United States. It did not include the lands of the company, nor any of its property, except the road and the telegraph line. It certainly did not include the earnings of the company. What, then, was subordinated to it? I think nothing but the lien of the United States bonds, — that lien which was reserved in the fifth section of the act of 1862. This is the express language of the section. Whatever right to the railroad and telegraph line the United States had by virtue of its mortgage, that right was postponed to the mortgage bonds authorized by this tenth section, and issued under it. Nothing else was postponed. Subordination of the lien of the United States to the company's first mortgage could not have the effect of enlarging the operation and scope of that mortgage and bringing additional subjects within it. Surely it did not make the mortgage a lien upon any other property than that which the company was authorized to mortgage. It did not make it a lien, either prior or subsequent, upon the lands of the company, or the income or earnings of its road. And as I think I have shown the duty of the com-

pany to apply annually five per cent of its net earnings, after the completion of its road, to the payment of its debt to the United States, was collateral to its other obligations, — a cumulative duty, not embraced in the lien or mortgage reserved by the United States in the fifth section of the act of 1862, — it cannot be affected by the tenth section of the act of 1864. Whatever else was postponed, it was not.

It has been argued on behalf of the appellant that the exception from the subordinating clause of those provisions of the sixth section of the act of 1862, relating to the transmission of despatches, and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States, implies that the other provisions of that section, or at least the five per cent provision, were intended to be subordinated to the lien of the first-mortgage company bonds. This supposed implication is the principal reason urged in support of the position taken by a majority of the court. It is, however, in my judgment, entirely unfounded. The purpose of the exception appears to me to be very plain. As I have noticed, the section authorized the company to issue their first-mortgage bonds upon the railroad and the telegraph line, and enacted that the lien of the United States bonds should be subordinate to the company's first-mortgage bonds. Subordinate, clearly, only in its effect upon that which was covered by the company's mortgage, namely, the road and the telegraph line. But if the company's mortgage was permitted to be without exception the paramount lien upon the road and telegraph line, the right secured to the United States by the sixth section of the act of 1862 to the transmission of despatches, and transportation of the mails, &c., might be totally destroyed by a foreclosure of the mortgage and a sale under it. To guard against this possibility was evidently the sole purpose of the exception, and its necessity is manifest. I repeat, if the company's authorized mortgage on the railroad and the telegraph line were permitted to be, without restriction, a paramount lien, the preferential right secured to the United States by the conditions of the sixth section of the act of 1862 — the right to the transmission of despatches and transportation of mails, stores, munitions of war, &c., in preference to

others — would have been at the mercy of the company's mortgagees. That right of priority Congress was not willing to endanger. The exception was introduced to avert the danger of its loss. Congress, in effect, said to the company, "Though we agree that your mortgage shall be the first lien upon the road and the telegraph line, yet no foreclosure of it, no taking possession under it, and no sale shall interfere with the right of the United States to the transmission of despatches and to transportation in preference to all others." To save that right the exception was necessary. It had reference solely to the operation of the company's mortgage upon the *road*, upon which a preferential right to transportation had been reserved, and to the *telegraph line*, along which government despatches were first to be carried. I cannot believe it had any other purpose or intent, much less that it was intended to operate as a grant, or to postpone the other rights assured to the United States in the sixth section. The implication that every duty in that section imposed upon the company, except the one expressly mentioned, was intended to be subordinated to the lien of the company's bonds is too unreasonable to be accepted, and it will not be claimed. Yet such must be the extent of the implication, if the exception means what the majority of the court think it means. If the duty of the company to apply to the payment of its bonds a percentage of its net earnings annually after the completion of its road is postponed to the rights of the first-mortgage bondholders, so is the duty to apply one-half the compensation for services rendered for the government, and so is the duty to keep the railroad and telegraph line in repair, by parity of reason. Those rights of the government and the right to the percentage of the earnings stand alike. They are all reserved by the tenth section of the act of 1864.

My conclusion, therefore, is that nothing in the tenth section of the act of 1864 postpones the right of the government to recover five per cent of the net earnings of the road before any thing is deducted from those earnings for either principal or interest of the first-mortgage bonds of the company.

It may be that the construction of the acts of Congress for which I contend, if adopted by the court, would not increase

the amount recoverable by the United States in the present suit, but it may have an important effect on future claims against the company for the five per cent, and it has upon the claims of the United States against the other companies to which the sixth section of the act of 1862 was applicable.

PARSONS v. JACKSON.

Certain bonds of a railroad company in Louisiana, promising to pay to the bearer either £225 sterling in London, or $1,000 in New York or in New Orleans, declared that the president of the company was authorized to fix by his indorsement the place of payment. On their back were printed the following words: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——." The blank for the place of payment was not filled. The bonds were never issued by the company, but were seized and carried off during the late war. They, and the past-due coupons thereto attached, were purchased in New York for a very small consideration. *Held*, 1. That, in the absence of the required indorsement, the uncertainty of the amount payable is a defect which deprives the bonds of the character of negotiability. 2. That the purchaser was affected with notice of their invalidity, and does not sustain the position of a *bona fide* holder without notice.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This is an appeal by Edwin Parsons, George Parsons, E. G. Pearl, Charles Parsons, and Scott, Zérega, & Co., from the decree of the court below, confirming the report of the master disallowing as a charge on the mortgage executed by the Vicksburg, Shreveport, and Texas Railroad Company certain bonds held by the appellants and purporting to have been issued by that company.

The bonds, which are mentioned by the master as forming a part of schedule BB, are ninety-seven in number, and each for $1,000.

The remaining facts are stated in the opinion of the court.

Mr. N. A. Cowdrey for the appellants.

The instruments, although under seal, were negotiable instruments. *Mercer County* v. *Hacket*, 1 Wall. 88; *Marion County*

v. *Clark*, 94 U. S. 278. If any one must suffer, it should be the railroad company, and not the *bona fide* purchaser of them without notice. *Murray* v. *Lardner*, 2 Wall. 110.

The record shows that the appellants are the lawful holders for value of the bonds, and that they purchased them in open market, without actual notice or knowledge of any defects or irregularities in their issue. This gives to them a good title to the bonds. *Murray* v. *Lardner*, *supra*; *County of Ray* v. *Vansycle*, 96 U. S. 675; *Goodman* v. *Simonds*, 20 How. 343; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Hotchkiss* v. *National Bank*, 21 id. 354; *Cromwell* v. *County of Sac*, 96 U. S. 51; *San Antonio* v. *Mehaffy*, id. 312.

One who has given a note currency cannot impeach its legality. In this case the makers do not attempt so to do. *Henderson* v. *Anderson*, 3 How. 73; *Morgan* v. *Railroad Company*, 96 U. S. 716.

Other bondholders cannot make a defence that the maker of the obligation is precluded from making.

The validity of the bonds is not impaired by the fact that their place of payment was left blank. Any holder was authorized to fill the blank. The president of the company had signed it in blank for that purpose. *McGrath* v. *Clark*, 56 N. Y. 34; Chitty, Bills (9th ed.), 151.

It is the practice of railroad companies in Louisiana to leave the place of payment blank, so that the holder may insert it.

Where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled, it carries on its face an implied authority to complete it by filling the blanks. *Angle* v. *Northwestern Life Insurance Co.*, 92 U. S. 330; *Bank of Pittsburg* v. *Neal*, 22 How. 96; *Redlich* v. *Doll*, 54 N. Y. 235, and cases there cited; *Garrard* v. *Haddan*, 67 Pa. 82; *Montague* v. *Perkins*, 22 Eng. L. & E. 516; *Fleckner* v. *United States Bank*, 8 Wheat. 338.

Mr. John A. Campbell, *contra*.

A negotiable instrument is a writing containing a promise to pay, unconditionally, a certain sum of money to a person determined by the instrument.

These bonds show an obligation to pay a certain number of pounds sterling, or a certain number of American dollars,

whether the one or the other, or any, according to the terms of the bonds, was to be declared by the indorsement of the president of the railroad company. No such declaration is to be found. He did not negotiate these bonds, nor intrust them to another for negotiation. They were carried away from the custody of the company amid tumult and violence, without its consent or privity, and without its fault or neglect. The absence of a negotiable quality — for a floating contingent promise is not negotiable — and the fact that they were never negotiated disprove the validity of the appellants' title to them. Story, Prom. Notes, sects. 19, 20, 22; Chitty, Bills, 152; *Floyd's Acceptances*, 7 Wall. 666.

On the face of the bonds an act is imposed upon the president of the corporation, without which the bonds as negotiable securities are incomplete. The absence of his indorsement indicated to the holders and buyers that he had a duty to perform, and that the bonds in their then condition had not the constituents of negotiable paper. *Goodman* v. *Simonds*, *supra*, Chitty, Bills, 206, 225.

There was no trust or confidence on the part of the corporation or of its president reposed in any other party whereby these bonds reached the New York market.

The corporation not being blameworthy for the circulation of the bonds is not responsible thereon. *Foster* v. *McKennon*, Law Rep. 4 C. P. 704; *Nance* v. *Lary*, 5 Ala. 37; *McGrath* v. *Clarke*, 56 N. Y. 34; *Angle* v. *Northwestern Life Insurance Co.*, 92 U. S. 330; *Tayler* v. *The Great Indian Peninsula Railway Co.*, 4 De G. & J. 558; *Michigan Bank* v. *Eldred*, 9 Wall. 544.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises out of the supplementary proceedings which took place in the case of *Jackson et als.* v. *The Vicksburg, Shreveport, & Texas Railroad Co. and Others* (reported under the name of *Jackson* v. *Ludeling*, in 21 Wall. 616), after our decision therein. In pursuance of the mandate issued in that case, the court below made a further decree on the twenty-second day of March, 1875, directing, amongst other things, as follows, that is to say: —

"3. It is ordered that F. A. Wollfley be appointed special master to take the proofs of the bonds *bona fide* issued by the said Vicksburg, Shreveport, and Texas Railroad Company, and to report the names of the owners and the amounts due to the holders of such bonds so issued. . . .

"He will give notice to the holders of bonds *bona fide* issued for twenty days by publication in one of the city papers that he is ready to receive proofs of the debt aforesaid, and that he shall hold sessions for thirty days each day, Sunday excepted, from the date of his first publication in the paper for that purpose."

In pursuance of this decree the master gave the required notice, and received proofs adduced by those claiming to hold bonds entitled to the benefit of the decree rendered by this court. By his report, filed the seventeenth day of January, 1876, it appears that there were then outstanding seven hundred and sixty-one bonds *bona fide* issued by the said railroad company, of which schedules were annexed to his report. He further reported a schedule of certain other bonds executed by the company, and presented to him as issued under the mortgage mentioned in the decree; but which the testimony taken by him proved were never issued by the said company, its officers or agents, but were carried off by persons belonging to, or taking advantage of, a raid upon the town of Monroe, La., during the late war, in the month of April, 1864. As to these bonds, the master further reports as follows: —

"None of the parties presenting these bonds, or the coupons on them, have proved at what time, for what consideration, or under what circumstances they acquired them, except Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons, George Parsons, and Scott, Zérega, & Co. in liquidation. In reference to this class, if the bonds were complete in all their parts and no circumstances of suspicion appeared on their face, the proof that they had not been issued *bona fide* under the authority of the corporation, and other facts relative to the issue, would have required the parties to prove that they were *bona fide* holders for a valuable consideration.

"In reference to the claims of Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons, and Scott, Zérega, & Co.

in liquidation, I report that in addition to the fact that the bonds were not issued *bona fide*, but were taken by force from the custody of the company, that there appears on the indorsement of the bonds a material deficiency and an incompleteness which deprives them of the character of commercial instruments fit for circulation. I also report that the railroad was at the date of their purchase in a damaged condition, it having been under the control of the military power of the Confederate States and the United States, which had been used to partially destroy it. That there were several years of unpaid coupons on each of the bonds, in the most of cases being contemporaneous with the execution of the mortgage; that these bonds were sold for an insignificant sum, and apparently purchased at a hazard, without any view to their character as commercial instruments fit for circulation, and that neither from the date of this suit, the 1st of December, 1866, nor in any proceedings antecedent thereto, did the holders, or any of them, appear to maintain any claim for protection.

"I therefore report that the said bonds mentioned in the schedule BB were not issued *bona fide* by the said railroad company, and ought not to be allowed as a charge on the mortgage."

The parties above named excepted to this report; but after hearing thereon, the court confirmed the same, and made a decree disallowing the said last-mentioned bonds, and from that decree the present appeal was taken.

From the evidence taken by the master it appears that the appellants purchased the bonds held by them, in the city of New York, in November and December, 1865, at from ten to fifteen cents on the dollar, without any actual knowledge that they were not issued by the company. But it further appeared that none, or very few, of the coupons had been cut off from the bonds, and that the latter were imperfect in form.

Each bond, on its face, certifies "that the Vicksburg, Shreveport, and Texas Railroad Company is indebted to John Ray, or bearer, for value received, in the sum of either £225 sterling or $1,000 lawful money of the United States of America; to wit, £225 sterling if the principal and interest are payable in London, and $1,000 lawful money of the United States of

America if the principal and interest are payable in New York or New Orleans," &c. This is the obligatory part of the instrument, and is necessarily indeterminate in its character without some further designation of the place at which it is to be paid. Each bond, further, on its face declares that "the president of said company is authorized to fix, by his indorsement, the place of payment of the principal and interest in conformity with the terms of this obligation." And on the back of the bonds is indorsed a printed blank in the following words, to wit: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——." On the bonds, which are conceded to be genuine and *bona fide* issued, this blank is filled up with the name of some place, as, for example, "the city of New York;" or, in some cases, "New Orleans, at the Citizens' Bank of Louisiana," &c. All the indorsements have the signature of the president of the company, but on the bonds in question the above blank for the place of payment is not filled up. The mortgage under which the bonds purport to be issued, and which is referred to in the body thereof, contains the same provision with respect to the place of payment. After referring to the bonds to be issued under and secured by it, its language is as follows: "The principal and interest of said bonds being made payable in New Orleans, New York, or London, as he, the said president, by his indorsement, may determine." The resolutions of the board of directors, authorizing the execution of the mortgage and the issue of the bonds, which resolutions are copied in the mortgage, contain the same provision; namely, "The principal and interest of said bonds being made payable in New Orleans, New York, or London, as the president, by his indorsement, may determine." These resolutions, being the authority by virtue of which the mortgage and bonds were executed and issued, would seem to be mandatory, and to require that the place of payment should be indorsed by the president on the bonds independently of the necessity of such indorsement for the purpose of fixing the amount payable thereon.

The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they

stand, they amount to a promise to pay so many pounds, or so many dollars, — without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency. 1 Daniel, Neg. Inst., sect. 53. And although it is held that *id certum est quod certum reddi potest*, — a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made, yet, without such indorsement, the uncertainty remains, and operates as an intrinsic defect in the security itself.

Now it is shown by the master's report, and if it were necessary to go behind the report, the evidence shows, that these bonds were never issued by the railroad company at all, but were seized and carried off by a raid of soldiers during the war. They afterwards turned up in New York, and were purchased by the appellants; and the question is, whether the fact that the past-due coupons were still attached, and that no place of payment was indorsed on the bonds, as required to be done by the bonds themselves, was sufficient to put the appellants upon inquiry as to their validity, and as to the *bona fides* of their issue; — these marks of suspicion being supplemented by the further fact, that the bonds were offered for a very small consideration.

Our opinion is, that the appellants had abundant cause to question the integrity of these bonds, that they were affected with notice of their invalidity, and cannot be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry. The imperfection as to the place of payment is another strong evidence of want of genuineness. Of course, it is not necessary to the validity of a bond that it should name a place of payment; but these bonds expressly declare that they are to be payable at the place which should be determined by the president's indorsement, and that the sum payable should depend on that indorsement; and yet no indorsement appears thereon. We do not say that this defect would have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain; but it was a pregnant warning to the par-

chasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue. The case is so plain, that it is hardly necessary to cite any authorities on the subject. "A person who takes a bill," said this court in *Andrews* v. *Pond et al.* (18 Pet. 65), "which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice." The same doctrine is reaffirmed in *Fowler* v. *Brantley et al.* (14 id. 318), and, indeed, is elementary law. The circumstances in this case went farther than merely to cast a shade of suspicion upon the bonds: they were so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title. See 1 Daniel, Neg. Inst., sect. 796.

Decree affirmed.

KEELY v. SANDERS.

1. The court reaffirms the doctrine in *De Treville* v. *Smalls* (98 U. S. 517), that the certificate given by the commissioners to the purchaser of lands at a sale for a direct tax, under the act of June 7, 1862 (12 Stat. 422), as amended by the act of Feb. 6, 1863 (id. 640), is *prima facie* evidence of the regularity of the sale and of all the antecedent facts essential to its validity and to that of his title thereunder, and that it can only be affected by establishing that the lands were not subject to the tax, or that it had been paid previously to the sale, or that they had been redeemed.
2. The sale may be valid, although, when it and the assessment were made, the lands belonged to a non-resident and were *in custodia legis*, the State court in which the *lis* was pending having enjoined all creditors from interfering with or selling them, and they were sold as an entirety, notwithstanding the fact that the tax bore but a small proportion to their value.
3. A description of the lands in the notice of sale, which identifies them so that the owner may have information of the claim thereon, is all that the law requires.
4. The word "district," where it occurs in the sixth section of the said act of 1862, signifies a part or portion of a State. The city of Memphis, Tenn., where the lands in controversy are situate, was, therefore a district within the meaning of that section.

ERROR to the Supreme Court of the State of Tennessee.
The facts are stated in the opinion of the court.

Mr. William M. Randolph for the plaintiff in error.
There was no opposing counsel.

MR. JUSTICE STRONG delivered the opinion of the court.

In the courts of the State this was a bill to quiet title to a parcel of ground in the city of Memphis, filed against the appellant, who claims to be the owner by virtue of a sale for direct taxes made June 24, 1864, and who holds a certificate of tax sale (No. 1054) given to him in accordance with the seventh section of the act of June 7, 1862 (12 Stat. 422), as amended by the act of Feb. 6, 1863. The force and effect of that certificate we have had occasion to consider in *De Treville* v. *Smalls*, 98 U. S. 517. By the act of Congress it is made *prima facie* evidence of the regularity and validity of the tax sale and of the title of the purchaser under it, and it is enacted that it shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previously to the sale, or that the property had been redeemed according to the provisions of the act. The bill assails the title of the appellant, and charges that the sale made to him was null and void, for ten different reasons, which it assigns. Most of them are assertions of fact, denied in the answer and sustained by no proof. Among the charges is one that at the time of the tax sale the property was *in custodia legis*, and that under orders of the State court in which the *lis* was pending all creditors — individual, State, and Federal — were enjoined from selling or interfering with the same. This, of course, was susceptible of proof only by the record. But no such record was produced. All that was submitted was the parol testimony of a witness that the Chancery Court and the Supreme Court had both taken jurisdiction of the property, and ordered sales of the same, or parts thereof, to pay the debts of the decedent owner. Waiving, however, objection to this mode of proof, we do not perceive that the fact charged, if it was a fact, had any tendency to impair the validity of the tax sale. Such a sale did not disturb any possession which the State court had

of the property; and no State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action; and certainly it would be a strange thing if a State court by its action could relieve property to Federal taxation from liability to pay the taxes when they are due.

Secondly, the bill charges that the property was misdescribed in the publication, orders of sale, and in the sale itself, and that no legal or proper notice of the sale was ever given by advertisement or otherwise. There is, however, no proof of any material misdescription. The lot was described as follows: "Market Street and Thornton Avenue part of country lot five hundred and six (506) two acres, assessed to Sanders and Perkins in 1860, fifth civil district, city of Memphis." That this was a true description, quite sufficient to identify the property, is not denied. Nor is it denied that it is the same as that made in the State assessment of 1860. But it is charged that though the property was part of lot 506, as described, the part sold was known as portions of lots 19 and 3, allotted to the heirs and devisees of Sanders. It was not, however, described in the State assessment by those numbers, and mentioning those numbers in the description made by the tax commissioners would have added nothing to its certainty. The purposes in describing lands to be sold at a tax sale, says Judge Cooley, in his Law of Taxation, p. 284, "are, *first*, that the owner may have information of the claim made upon him or his property; *second*, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, *third*, that the purchaser may be enabled to obtain a sufficient conveyance." "If the description is sufficient for the first purpose, it will ordinarily be sufficient for the others also." There can be no doubt that the description in this case was all that was needed to identify the land, and to inform the Sanders heirs or devisees, who are the complainants in the bill, of the claim made upon their property.

As to the objection that the property was not advertised for sale legally and properly, it is sufficient to say that the act of Congress makes the commissioners' certificate of sale *prima*

facie evidence of the regularity and validity of the sale and of the title of the purchaser. Even if it is not conclusive of the existence of every thing antecedent necessary to such regularity and validity, except liability for taxes and their non-payment, it is affirmative evidence, controlling until rebutted. In this case, so far from there being any evidence to rebut the *prima facies* of the certificate, or any evidence to support the allegation of the bill, there is positive testimony that the property was advertised for sale in a newspaper then published in Memphis.

Thus far we have not considered the effect of the proviso to the seventh section of the act of 1868. That should not be overlooked. After having declared that the commissioners' certificate should be *prima facie* evidence both of the regularity and validity of the sale, as well as of the title of the purchaser, Congress went further, and enacted that it should be affected as evidence of such regularity, validity, and title only by establishing one or more of three facts: non-liability of the property for taxes, or that the taxes had been paid before the sale, or that the property had been redeemed. Of what possible use was this proviso, unless it was intended to make the certificate conclusive of the validity of the sale and the title of the purchaser, unless it should be impeached by establishing one of the three facts mentioned? If it meant only that proof of the existence of one of those facts should destroy the *prima facie* effect of the certificate, it was quite superfluous. Without it, if either of those facts existed, a sale would have been invalid, and the certificate good for nothing, no matter how regularly the sale might have been conducted, or how fully and correctly it might have been advertised, or how accurate might have been the assessment. Congress must have had a purpose in the proviso, and what that was it is not difficult to discover. It was not to repeat what had been enacted in the same section. The provisions of the whole act were designed to enforce the collection of direct taxes in insurrectionary districts, avowedly so. Governmental disturbance in such districts must have been anticipated, as well as only a partial restoration of the ordinary forms of governmental rule, while the districts were under military control, and consequent irregularities in the processes

of collecting taxes. Substance, therefore, not form, was to be required. Hence the proviso. It secured to land-owners every substantial defence against sales for taxes, and made the sale certificate conclusive of every thing else. Such was our opinion expressed in *De Treville* v. *Smalls*, and we adhere to it now.

The fourth and fifth objections to the validity of the sale are, that while the taxes due bore but a small proportion to the value of the property, the commissioners sold it as an entirety without subdivision. If this was so, it was a mere irregularity, and by no possibility could it affect the validity of the sale. But it was not even an irregularity. The seventh section of the act of 1863 required the commissioners to sell the "lot or parcel of land" upon which the tax was assessed, not such parts of it as on trial might prove sufficient to pay the tax. It was not made their duty to subdivide the property.

Another objection urged in the bill against the title acquired by the appellant at the commissioners' sale is in effect that the complainant resided in Texas; did not know of the sale until after it was made; that some other person who was interested could not get to Memphis in time to redeem before the commissioners had left; and that there was no safe communication by travel or otherwise outside the city to Nashville or elsewhere. All this is only asserted as hearsay, and there is no proof that there was ever any attempt to redeem, or any purpose to redeem. On the contrary, the proof is that one of the owners was in the city of Memphis before the commissioners left, and was told he could redeem the property if he wished; but he refused, expressing the opinion that "as soon as the courts got organized it would all be upset." But at best, the objection is wholly unimportant. The law charged the tax upon the land. The proceeding to collect it was a proceeding *in rem*, of all stages of which the owners had legal notice. It was their duty to pay the tax when it was due. The commissioners were not bound to hunt them up. *Turner* v. *Smith*, 14 Wall. 553. And it is not claimed that either the commissioners or the purchaser at the sale had any agency in preventing a redemption, or that there was any obstacle in the way thereof that could not easily have been overcome. While it may be admitted that a statutory right of redemption is to be favorably regarded, it is nev

ertheless true that it is a statutory right exclusively, and can only be claimed in the cases and under the circumstances prescribed. Courts cannot extend the time, or make any exceptions not made in the statute. Redemption cannot be had in equity (*Mitchell* v. *Green*, 10 Metc. (Mass.) 101), except as it may be permitted by statute, and then only under such conditions as it may attach. *Craig* v. *Flanagan*, 21 Ark. 319. Thus it has been held that the pendency of the civil war, and the fact that the owner resided in another State then in rebellion, cannot enlarge his right to redeem. *Finley* v. *Brown*, 22 Iowa, 538. It is enough, however, for the present case that there was no attempt or even offer to redeem.

There are several other matters charged by the bill as objections to this sale unsustained by evidence, and immaterial.

One more only requires consideration. It is the averment that when the tax sale was made the military authority of the United States was not established in and over the county of Shelby, State of Tennessee, nor was it established in any one county, as required by law.

The sixth section of the act of June 7, 1862, to which the act of Feb. 6, 1863, was a supplement, enacted that the board of tax commissioners should "enter upon the discharge of the duties of their office whenever the commanding general of the forces of the United States, entering into an insurrectionary State or district, should have established the military authority throughout any parish or district or county of the same." Manifestly this was only directory to the commissioners. It was neither a grant nor a limitation of power. By previous sections the tax had been charged upon every parcel of land in the State, and the commissioners had been authorized to fix the amount and receive payment. The sixth section merely directed when their duties should commence.

Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers.

That before the commissioners undertook to enforce the collection of the tax upon the lot in controversy, it had been determined by the executive that military authority had been established in the district, is plain enough. We know, historically, that the President had appointed a military governor of the entire State, and he was in active service as such. No other and civil authority existed. The commissioners themselves were executive officers, and their entering upon the duties of their office was an assumption that the military authority had been established throughout the district. The act of Congress required no express and formal determination that it had been so established, and therefore, whether it had or not, may be inferred from any executive action that assumed it had. Hence, opening an office for the collection of the tax, and proceeding to enforce collection, raised a presumption of the legality of the commissioners' action. The law presumes that persons acting in a public office have been duly appointed, and are acting with authority, until the contrary is shown. And it has been said that if officers of corporations openly exercise a power which presupposes a delegated authority for the purpose, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Bank of United States* v. *Dandridge*, 12 Wheat. 64.

This is not all of the case in hand. Not only is the averment of the bill that the military authority of the United States was not established in the county of Shelby when the tax sale was made denied by the answer, but the averment is unsustained by proof. The city of Memphis, it is conceded, was in full and undisputed possession of the Federal army. All that is proved is that the military lines were around the city, at a distance of a mile or so from its corporate limits, and that the remaining part of the county was not in Federal occupation. All that is quite consistent with the fact that Federal military authority was established over the whole county. No conquering army occupies the entire territory conquered. Its authority is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory. The inability of any other power to establish and maintain governmental authority therein is the test.

But if it should be conceded that Federal military authority had not been established throughout the entire county of Shelby, undeniably it had been over Memphis, where the sale was made and where the lot sold is situated. That city had territorial limits and a municipal organization, with taxing power and assessments distinct from the county of which it was a part. It was in a very proper sense a "district," and, we think, a district within the meaning of the acts of Congress. Those acts manifestly had in view not merely the larger civil divisions of a State or Territory, but "portions of a State," "sections of country," or "conquered territory." The title of the act of 1862 is, "An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and the first section enacted that "when in any State or Territory, or in *any portion* of any State or Territory, by reason of insurrection or rebellion, the civil authority of the government of the United States is obstructed," &c., . . . "the said direct taxes" . . . "shall be apportioned and charged in each State or Territory, *or part thereof*, wherein the civil authority is thus obstructed, upon all the lands and lots of ground situate therein," &c. The second section required the President to declare by proclamation in what States *or* "*parts of States*" the insurrection existed. These provisions make no reference to civil divisions of a State. And when we pass to the sixth section, it is observable that it speaks of an entry of a commanding general into "any *such* insurrectionary State or district." Here it is plain the word "district" means simply a "part" or "portion" of a State, such as has been previously mentioned. The section then proceeds to direct the commissioner to open offices when the military authority shall have been established throughout any county or parish or district of the same; that is, throughout any district of an insurrectionary district or State. It seems almost an inevitable conclusion that "taxing districts" was meant, and not alone the large divisions, such as counties or Louisiana parishes. "Taxing districts" were in view, as appears also from the thirteenth section, which contemplated a reference by the commissioners to the records of assessments and valuations previously made; and such districts for taxation had a well-known meaning when

Congress passed the law. They are portions of a State's territory, described for the purpose of assessment, not necessarily political subdivisions for any other purpose. Our conclusion, therefore, is that the city of Memphis was a district, within the meaning of the sixth section of the act of 1862; and for the various reasons we have given, we hold that the objection which we are now considering to the validity of the appellant's title is without foundation. Upon this mainly, if not alone, the court below appears to have rested its judgment.

The judgment of the Supreme Court of Tennessee will be reversed, and the record remitted with instructions to direct a dismissal of the bill; and it is

So ordered

MR. JUSTICE FIELD dissented.

UNITED STATES *v.* CENTRAL PACIFIC RAILROAD COMPANY.

1. This case, in all material respects, involves the same questions as *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), and the court adheres to the conclusion there announced as to the time when the road must be considered as completed, so as to render the company thereafter liable to pay annually five per cent of the net earnings of the road for the purposes mentioned in the sixth section of the act of July 1, 1862. 12 Stat. 489.
2. The rulings in that case upon the question of the earnings and expenditures of the road, and upon the principles by which the amount of net earnings is to be ascertained and in what manner paid, reaffirmed.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

The Attorney-General and *Mr. Joseph K. McCammon* for the plaintiff in error.

Mr. S. W. Sanderson, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action by the United States against the Central Pacific Railroad Company, to recover five per cent of the

net earnings of the railroad belonging to said company, from the sixteenth day of July, 1869, the date at which it is alleged that the said railroad was completed, to the thirty-first day of October, 1874. The road extends from the termination of the Union Pacific Railroad, at or near Ogden in the Territory of Utah, to the waters of the Pacific; and was constructed under the provisions of the Pacific Railroad Act of July 1, 1862, and the several acts supplementary thereto. It was originally constructed by two corporations of California, namely, the Central Pacific Railroad Company of California, and the Western Pacific Railroad Company; which companies, however, accepted the terms of the said acts of Congress, received subsidies from the government under the same, and were finally consolidated into one corporation under and by virtue of the said acts, by the name of the Central Pacific Railroad Company, which succeeded to all the rights and duties under said acts of Congress which belonged or appertained to the original companies.

On the trial, a jury was waived, and the court found the facts specially; and upon such findings gave judgment for the defendant. The United States brought a writ of error, and the case is now here for review.

The case, in all material respects, involves the same questions which have just been disposed of in the case of *Union Pacific Railroad Company* v. *United States*, *supra*, p. 402. The same subsidies were granted to the companies in this case, and upon the same terms and conditions, as in that of the Union Pacific Railroad Company; the same acts of Congress, in the main, applying to both. The claim of the government is founded upon that clause in the sixth section of the act of July 1, 1862, which declares that "after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." The allegation of the government is, that the railroad was completed on the sixteenth day of July, 1869; and that the net earnings of the road from that time to the thirty-first day of October, 1874, amounted to the sum of $36,732,702. The defendant denies the allegations of the bill; and the principal issue at the trial was, the time

of the completion of the road. The conclusion of the court from its findings of fact was, that the road was not completed until the first day of October, 1874, and, hence, that the government was not entitled to recover.

It is unnecessary to review all the findings. The course of proceedings was in all respects similar to what took place in the case of the Union Pacific Railroad Company: similar reports of completed sections by the company under the oath of its president, similar examination and reports of commissioners, and similar acceptances by the President of the United States. The seventh finding of the court is as follows: —

"VII. That as each section of twenty miles or more of the road was constructed, the president of the company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. Upon a favorable report by the commissioners, the President accepted the section provisionally, and issued to the company the bonds authorized by the statute. This was the course of proceeding till 1868, when it was found that the government might advance all the subsidies upon a road only provisionally accepted in sections, and have no security for its absolute completion, as a whole, up to the standard of a first-class road. The question of the propriety of this course was submitted to the Attorney-General, who rendered an opinion on Sept. 5, 1868, which was to the effect that the course before pursued by the government was in accordance with the law, and that the President had authority to appoint commissioners to review that portion of the road which had been accepted provisionally, and to refuse a final acceptance of the road as a whole until all the deficiencies should be supplied, and that sufficient subsidies might be withheld, or other guaranties required of the company to secure absolute completion. The opinion is reported in 12 Op. Att'y-Gen., at page 477, and is referred to and made a part of this finding. The President thenceforth acted upon this

opinion of the Attorney-General, and accepted each section when provisionally completed, leaving the question of the absolute completion of the road, as a whole, to be determined upon examination and report of commissioners to be specially appointed for that purpose."

This opinion had respect both to the Union Pacific and the Central Pacific roads.

The court then finds that on the 25th of September, 1868, the President, in pursuance of the opinion of the Attorney-General, appointed a commission of civil engineers to examine the entire road, so far as then provisionally completed, and report upon it in accordance with instructions to be furnished by the Secretary of the Interior; that these commissioners made their report on the 14th of May, 1869, pointing out many particulars in which the road as constructed failed to come up to the standard of a first-class road, and estimating that to supply such deficiencies would require a further expenditure of $1,493,380; that the Secretary suspended the grant of lands to the company until further orders, and required it to deposit with the Secretary of the Treasury $4,000,000 of its first-mortgage bonds, to secure the proper completion of the road, under a similar agreement to that made by the Union Pacific Railroad Company; that on the 11th of May, 1869, the connecting rail uniting the Central and Union Pacific railroads was laid, and soon thereafter regular through passenger and freight trains were placed upon the roads between San Francisco and Omaha, and have run regularly between said points ever since; and that on the sixteenth day of July, 1869, and ever since, said roads have been in fact operated as railroads, and have been able to carry, and have in fact carried, all passengers, freights, mails, troops, supplies, and munitions of war offered for transportation between the eastern terminus of the Central Pacific Railroad and the Pacific Ocean. The fourteenth finding is as follows: —

"XIV. That on July 15, 1869, the Secretary of the Interior transmitted to the President the report, dated May 15, 1869, of the commissioners appointed to examine and report upon a section of twenty and three-tenths miles of the Central Pacific Railroad, this being the last section constructed by said defend-

ant. In his letter transmitting said report to the President for his action, the Secretary says: 'I respectfully recommend the acceptance of the same, and that bonds be issued to the company thereon in accordance with the agreement made with the company, which is to the effect that they deposit their first-mortgage bonds with the Secretary of the Treasury to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the act approved July 1, 1862.'

"Recommendations in all respects similar to the last had been made by the Secretary of the Interior to the President as to the reports made upon the several preceding sections of the roads, and a similar approval was indorsed thereon by the President. Upon the same day, July 15, 1869, the Secretary of the Interior made a similar recommendation as to the section-commissioner's reports upon the last sections of the Union Pacific Railroad, in which he recommends a similar provisional acceptance of the section, and adds: '*Provided, however*, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned in my letter to you of the 27th of May last.'

"This recommendation was approved by the President, and the Secretaries of the Treasury and Interior directed to carry the same into effect. These constitute the last conditional acceptances of sections as provisionally completed."

By the twenty-fourth and twenty-fifth findings it is found as follows: —

"XXIV. That in pursuance of the provisions of said acts of Congress hereinbefore mentioned, and at the time of the construction, equipment, and provisional acceptance, as hereinbefore stated, of each and every section of said railroad by either of said railroad companies, the plaintiff issued and delivered to the said Central Pacific Railroad Company of California and to its assignee, the Western Pacific Railroad Company (where the latter was entitled thereto under said acts), except as in these findings otherwise indicated, when some portions were temporarily withheld as security for the

ultimate completion of the road, bonds of the United States of $1,000 each to the amount of forty-eight of said bonds per mile for each such section for one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, and thirty-two of said bonds per mile for all of said railroad constructed east of said last-mentioned point, and sixteen of said bonds per mile for all of said railroad constructed west of the western base of the Sierra Nevada mountains.

"XXV. That between the first day of July, 1862, and the twenty-seventh day of January, 1870, this plaintiff, in pursuance of said acts of Congress, caused to be issued and delivered to said railroad companies, in the mode and manner and at the times herein set forth, all except five of said $1,000 bonds. That the bonds so delivered by plaintiff to said companies amounted in the aggregate to the sum of $27,850,620."

It was further found that, in pursuance of the joint resolution of Congress, passed April 10, 1869 (as in the case of the Union Pacific Railroad Company), the board of eminent citizens referred to in that case, on the third day of November, 1869, made their report respecting the Central Pacific roads, in which they stated that the amount required to supply deficiencies and complete the work up to the required standard had been reduced since the last commissioners' report from $4,498,380, to $576,650; and the Secretary of the Interior thereupon modified his former order suspending the issue of patents to lands so as to allow patents for one half the lands to be issued, and soon after allowed the withdrawal of said first-mortgage and other bonds, still retaining as security the other half of the lands.

It thus appears that the work of the Central Pacific roads went on *pari passu* with the Union Pacific, and on the same terms and conditions; and that the roads were completed, the subsidy bonds received, and the collateral securities for the ultimate supply of deficiencies given up at the same time in each case.

We do not propose to repeat the views which have already been expressed in the case of the Union Pacific Railroad Company. Our conclusion, with regard to the time of completion of the road is the same in this case as in that. As this is the

only question raised by the record, it is unnecessary to add any thing further. The question of the amount of earning, and expenditures, and of net earnings deducible therefrom, was not reached by the court below, and is not presented to us for the expression of any opinion. But as we have indicated our views in the other case, as to the principles on which the amount of net earnings is to be ascertained, and in what manner they are to be paid, the court below, on a re-trial, will be governed by our opinion in that case.

The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial; and it is

So ordered.

MR. JUSTICE STRONG and MR. JUSTICE HARLAN dissented.

UNITED STATES v. KANSAS PACIFIC RAILWAY COMPANY.

1. The bonds granted by the United States to the Kansas Pacific Railway Company are not a lien on, nor is the company liable for five per cent of the net earnings of, that portion of its road west of the one hundredth meridian.
2. The court adheres to the rulings in *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), as to the principle which should govern in determining the amount of net earnings. In regard to certain items claimed by the company as proper deductions from the gross receipts of the road, the following should be excluded, — money needed to place it in proper repair, but not actually expended for that purpose; the expenses of the land department; the interest on the funded debt, which has priority over the lien of the United States; and the fifty per cent retained by the latter from the amount due for services rendered to it: and that the following items should be allowed, provided they were actually paid out of the earnings of the road, and not raised by bonds or stock, — the equipment account, or replacing and rebuilding rolling-stock, machinery, &c.; the amounts paid for depot grounds, and the expenses of same; and the construction account or improvements and additions to the track, &c.

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

The Attorney-General and *Mr. Joseph K. McCammon* for the plaintiff in error.

Mr. John P. Usher and *Mr. S. W. Sanderson, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was a suit brought in the court below by the United States against the Kansas Pacific Railway Company, to recover five per cent of the net earnings of the road belonging to that company from the time of the completion thereof, alleged to be the second day of November, 1869, to the thirty-first day of October, 1874; the said five per cent being claimed under the last clause of sect. 6 of the Pacific Railroad Act, passed July 1, 1862, which has already received consideration in the cases of the Union Pacific and the Central Pacific Railroad Companies, *supra*, p. 402, p. 449. The cause was tried by the court, the facts were specially found, and the conclusion arrived at that nothing was due to the government upon the alleged claim; and judgment was rendered for the defendant.

The Kansas Pacific Railway Company was originally chartered in 1855, by the Territory of Kansas, under the name of the Leavenworth, Pawnee, and Western Railroad Company, mentioned in the ninth section of the act of 1862, and afterwards, in 1863, received the name of the Union Pacific Railway Company, Eastern Division, and finally, in 1869, that which it now bears. By the section referred to, it was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, so as to connect with the Union Pacific at the initial point on the one hundredth meridian, "upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned" (that is, the Union Pacific).

The company accepted the terms of the act, and proceeded to construct its road, receiving subsidy bonds therefor at the rate of $16,000 per mile for the whole length of its road to the one hundredth meridian, being 393$\frac{15}{16}$ miles; all of which bonds were delivered as the work progressed. The road was completed to Sheridan, 405 miles west from the Missouri State line (the point of commencement), on the second day of

November, 1869, which is the date at which the government alleges that the road was completed. The authority of the company to extend its road west of the one hundredth meridian was derived from the ninth section of the act of 1864, which declared as follows: —

"*And provided further*, that any company authorized by this act to construct its road and telegraph line from the Missouri River to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: *Provided further, however*, that the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."

It thus appears that whilst the company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension. It is found by the court that the company actually extended its road westward as far as Denver, 245 miles beyond the one hundredth meridian; but did not complete the same to that point, so as to be accepted by the President, until the 19th of October, 1872.

A material question in this case is, whether the whole line to Denver, or only the line which the company was first authorized to construct (which terminated at the one hundredth meridian), is liable to the lien for the government subsidy, and the payment of five per cent of net earnings. If only the latter, then the time of completion was that which is claimed by the government, namely, the second day of November, 1869; but the net earnings liable to the claim of five per cent would be only those produced on the first 393$\frac{1}{16}$ miles, or if these cannot

be ascertained, then a *pro rata* amount of the whole net earnings of the road.

From a careful examination of the statutes relating to this subject, we are of opinion that, whilst, as to its entire line, the company, in the words of the ninth section of the act of 1864, is "entitled to all the benefits and subject to all the conditions and restrictions of the act;" and is bound to furnish transportation and telegraphic accommodations to the government on the usual terms; yet that the subsidy bonds granted to the company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the five per cent of the net earnings is only demandable on the net earnings of said portion. This deduction, we think, is clearly demonstrated by the words of the fifth section of the act of 1862, which creates the government lien for the payment of the subsidy bonds. Those words are that "the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, with the rolling-stock, fixtures, and property of every kind and description, [and] *in consideration of which said bonds may be issued.*" It is the road and appurtenances, in consideration of which, or in respect of which, the bonds are issued, that is subjected to the lien. This can apply, in the present case, only to the first 394 miles of the defendant's road. And as the lien only applies to this portion, the stipulation for payment out of net earnings cannot reasonably be applied to any other portion of the line.

This view is strengthened by the terms of the third section of the act of March 3, 1869, authorizing the defendant company to assign and transfer to the Denver Pacific Railway and Telegraph Company that portion of its line between Denver and Cheyenne. By that section, the said companies were authorized to mortgage their respective portions of said road (referring to the extension of the Kansas Pacific from the one hundredth meridian to Denver, and thence to Cheyenne) to the amount of $32,000 per mile; a privilege which would hardly have been conceded if the lien of the government bonds was deemed to extend over those portions of the line.

The result of this conclusion is, that only such part of the

annual net earnings of the road as are due to the first 393$\frac{14}{15}$ miles are in any event subject to the payment of the five per cent in question.

But inasmuch as the court below, in estimating the net earnings, credited the company for expenditures which are not allowable according to the principles announced by us in the case of the Union Pacific Railroad Company; and as, upon a proper accounting, it may appear that, in some years, the defendant company realized a sufficient amount of net earnings from its first 394 miles of road to pay the interest on the first-mortgage bonds, and leave a surplus applicable to the five per cent payable to the government, it will be necessary to reverse the judgment, in order that a new trial may be had between the parties. It is proper, however, before concluding, that we should indicate our opinion with regard to certain classes of expenditures on which the government and the company are at issue.

The former insists that certain items should be excluded from the account which are claimed by the latter to be legitimate. These items are designated in Schedule C, annexed to the findings of the court below, and are as follows: —

First. "Depreciation account, or expense not charged up." This is explained to be the amount necessary to put the road in proper repair, but which was not actually expended for that purpose. We are clearly of opinion that it is not a proper charge. Only such expenditures as are actually made can with any propriety be claimed as a deduction from earnings.

Secondly. "Construction account, or improvements and additions to track," &c. This item, according to what we have said in the Union Pacific Railroad case, ought to be allowed.

Thirdly. "Equipment account, or replacing and rebuilding rolling-stock, machinery," &c. This item should also be allowed as an expenditure properly chargeable to the earnings of the road, when actually paid out of the earnings and not raised by the issue of bonds or stock.

Fourthly. "Real estate purchased for depot grounds, &c., and expenses of same." This item is a proper charge if actually paid out of the earnings, and not raised by bonds or stock.

Fifthly. "Expenses of land department." This item is not allowable.

Sixthly. "Interest on funded debt prior to government lien." For the reasons expressed in the case of the Union Pacific Railroad Company, this item is not allowable, though the interest annually accruing on the first-mortgage bonds issued upon the first 393$\frac{14}{16}$ miles of the road is payable out of the net earnings before the five per cent due the government.

Seventhly. "Fifty per cent government earnings withheld." This, as explained in the previous opinion, is not allowable to be charged as an expense.

The judgment of the Circuit Court will be reversed, and the cause ordered to be remanded for a new trial; and it is

So ordered.

UNITED STATES *v.* DENVER PACIFIC RAILWAY COMPANY.

The Denver Pacific Railway and Telegraph Company is not liable for the debt incurred by the Kansas Pacific Railway Company on account of subsidy bonds; and although it is bound to perform the government service stipulated by the Pacific Railroad acts at the rates therein prescribed, and is subject to their provisions, so far as they are applicable to it, no part of the compensation due it for such service can be retained by the United States.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

The Attorney-General and *Mr. Joseph K. McCammon* for the appellant.

Mr. John P. Usher and *Mr. S. W. Sanderson, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

The decision in this case is controlled by *United States* v. *Kansas Pacific Railway Company*, *supra*, p. 455. By virtue of the act of March 3, 1869 (15 Stat. 324), the latter company, under the name of the Union Pacific Railway Company, Eastern Division, was "authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construc-

tion, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations, pertaining to said part of its line."

By the same act it was further enacted as follows: —

"SECT. 2. And be it further enacted, that the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne."

. . . . . .

"SECT. 3. And be it further enacted, that said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding $32,000 per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: *Provided*, that neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this act."

The arrangement which was thus provided for and authorized, having been made between the two companies, and each having constructed its particular portion of the road, the government claims that the subsidy bonds granted to the Kansas Pacific Railway Company upon the first 393$\frac{15}{16}$ miles of its road, are a lien upon the whole line to Cheyenne, no matter who built it, if built under the authority and powers given to that company; and that five per cent of the net earnings of the entire line are applicable to the payment of said bonds.

In *United States* v. *Kansas Pacific Railway Company* (*supra*, p. 455), we held that the lien of the bonds referred to only extends to the road in respect of which they were granted, and not to the extension of it west of the one hundredth meridian. Of course, that decision controls the present case.

Other reasons might be assigned why the Denver Pacific Rail way and Telegraph Company is not liable to pay the five per cent in question, but it is unnecessary to adduce them. The company is bound, of course, to perform the government service stipulated for by the sixth section of the act of 1862, being paid therefor at the rates therein prescribed; and is bound by such other provisions of the act of 1862 and the various supplementary and amendatory acts, as are applicable to it.

Judgment affirmed.

NOTE. — At a subsequent day of the term, MR. JUSTICE BRADLEY remarked: Since delivering the opinion in this case, our attention has been called to the fact that, whilst affirming generally the judgment of the court below, we did not expressly pass upon the question of the right set up by the government to retain one half of the amount of compensation due from it to the claimant for the transportation of mails and other public property. This point was not overlooked in rendering our judgment in the case. We cannot conceive on what principle the retention can be claimed, since the object of retaining the compensation for such services, or any portion thereof, as expressed in the sixth section of the act of 1862, was to apply the amount so retained to the debt due to the government for subsidy bonds granted to the companies that should receive the same. But the claimants in this case received no such bonds, and we decided that neither the company, nor its railroad or property, is liable in any way for the payment of any debt incurred for such bonds received by the Kansas Pacific Railway Company. Consequently there is no room for the application of the right of retention in this case, and the judgment of the Court of Claims was properly rendered for the whole amount of such compensation due.

RAILWAY COMPANY *v.* ALLING.

DENVER AND RIO GRANDE RAILWAY COMPANY *v.* CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

1. Where the trustees or directors of a corporation have appealed from a decree, and directed their counsel to prosecute the appeal, this court will not dismiss it on the motion of strangers to the decree who, since it was rendered, have become the owners of a majority of the stock of the corporation.
2. Such trustees or directors are in law the managers of the property and affairs of the corporation. As such they, in all litigation involving its action, represent it, its stockholders and creditors. If they violate their trust, the remedy must be sought in some court of original jurisdiction.
3. An act entitled "An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8, 1872 (17 Stat. 339); an act amendatory thereof, approved March 3, 1877 (19 Stat. 405); and an act entitled "An Act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875 (18 Stat. 482), — considered with reference to the conflicting claims of the Denver and Rio Grande Railroad Company, and the Cañon City and San Juan Railway Company, to occupy and use the Grand or Big Cañon of the Arkansas for railroad purposes. *Held*, 1. That said act of 1872 granted an immediate beneficial easement in a particular way over which the routes designated in the charter of the Denver Company lay, capable, however, of enjoyment only when such way should actually and in good faith be appropriated for the purposes contemplated by that charter, and then the title thereto would take effect by relation as of the date of the act. 2. That that company finally appropriated the right of way through the cañon April 9, 1878, and was by its prior occupancy entitled to the benefits conferred by said act of 1872. 3 That both companies should be allowed to proceed with the construction of their respective roads through said cañon where it is broad enough for them to do so without interfering with each other; but where, in the narrow portions of the defile, this is impracticable, the court below, while recognizing and enforcing the prior title of the Denver Company, should, by proper orders, secure upon just and equitable terms the right of the Cañon City Company, under said act of 1875, to use, in common with the Denver Company, the same road-bed and track, after the same shall have been completed.

APPEALS from the Circuit Court of the United States for the District of Colorado.

These causes involve the conflicting claims of two railroad corporations — the Denver and Rio Grande Railway Company and the Cañon City and San Juan Railway Company — to occupy and use the Grand or Big Cañon of the Arkansas for

railroad purposes. For the sake of brevity, the former will be hereafter designated as the Denver Company, and the latter as the Cañon City Company.

The Denver Company was incorporated in the year 1870, in conformity to the laws of the then Territory of Colorado. Its object, expressed in the articles of incorporation filed in the proper office of the Territory, was to locate, construct, operate, and maintain certain railway and telegraph lines; viz., the Denver and Rio Grande Railway, the Denver and Southern Railway, the South Park Railway, the Western Colorado Railway, the Morena Valley Railway, the San Juan Railway, the Gallesto Railway, and the Santa Rita Railway. The general route of each line was designated in the articles of incorporation. That of the main line — the Denver and Rio Grande Railway — was as follows: —

"Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte River, on the southeast side thereof, to a point at or near the mouth of Plum Creek; thence up the valley of Plum Creek, to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek Valley to the lake in township 11, range 67 west, on the east of the ridge dividing the waters of Plum Creek and Monument Creek; thence down the valley of Monument Creek to a point at or near the junction of the valleys of the Monument and Fountain *qui bouille*, or to a point in the Fountain Valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley of the Fountain or across its west tributaries to such a point on the Arkansas River at or above Pueblo as may be found upon a detailed survey to be the most eligible for intersecting the same; *thence up the valley of the Arkansas to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the Big Cañon of the same to a point at or near the mouth of the Arkansas River;* thence by the valleys or the adjoining slopes of the Arkansas River and of Pueblo Creek to the summit of the divide between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis Valley to the valley of the Rio Grande del Norte; thence in a general southerly direction, by the particular route which may be determined upon by a detailed survey to be

most eligible, down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico."

The remaining seven roads are, or were intended to be, branches or feeders of the main line.

By an act of Congress, approved June 8, 1872 (17 Stat. 339), "the right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard-room and side-tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line," was granted and confirmed unto the Denver Company, its successors and assigns. The act describes the company as a corporation created under the incorporation laws of the Territory of Colorado, and grants, ratifies, and confirms to it all the rights, powers, and franchises conferred by those laws on corporations created thereunder for constructing and operating railroad and telegraph lines, for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the conditions and requirements of the territorial statutes so far as the same were applicable and not inconsistent with the laws of the United States. The act, also, gave to the company the rights, powers, and privileges conferred upon the Union Pacific Railroad Company by sect. 3 of the act of July 2, 1864. But the rights thus granted and conferred were accompanied by the proviso that the company should complete its railway to a point on the Rio Grande as far south as Santa Fé, within five years after the passage of the act; and complete each year thereafter fifty miles additional south of that point.

By an act approved March 3, 1875 (18 id. 576), that of June 8, 1872, was corrected by adding thereto a proviso, which was declared to have been omitted by mistake of the copyist. That proviso enacts, among other things, that the "Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation."

On the same day, Congress passed an act "granting to rail roads a 'right of way through the public lands of the United States.'" 18 Stat. 482. It grants that right to any railroad "company duly organized under the laws of any State or Territory, except the District of Columbia, or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to line of the road, material, &c., necessary for the construction of the road, and grounds for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations," &c.

The second section provides: —

"That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any cañon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any cañon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any cañon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most

favorable location, and in as perfect a manner as the original road; *Provided*, that such expenses shall be equitably divided between any number of railroad companies occupying and using the same cañon, pass, or defile."

Section 4 declares that any railroad company desiring to secure the benefits of that act shall, "within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land-office for the district where such land is located, a profile of its road; and upon the approval thereof by the Secretary of the Interior," the same was required to "be noted upon the plats in said office, and thereafter all such lands over which such right of way passes should be disposed of subject to such right of way." All rights thereby granted to be forfeited as to any section located but uncompleted within five years after such location.

On Feb. 15, 1877, Alling, Locke, and Megrue became incorporated under the laws of Colorado as "The Cañon City and San Juan Railway Company," with a capital stock of $100,000, for the purpose of constructing and maintaining a railroad from Cañon City, thence up the valley of the Arkansas River through the Grand Cañon thereof, thence, by the most practicable route, following that river to South Arkansas post-office in Lake County, Colorado. The articles of incorporation were filed in the office of the Secretary of State of Colorado, Feb. 19, 1877. The Secretary of the Interior, in an official communication, declared, June 22, 1877, his approval of the proofs of organization filed by that company, and of the map showing the line of its road for a distance of twenty miles.

Congress, March 3, 1877, passed an act amending that of June 8, 1872, so as to read that the Denver Company should have ten years, from the passage of the original act, to complete its road as far south as Santa Fé, in default of which, as to the unfinished part of it, the rights and privileges granted should be null and void.

The Cañon City Company filed, April 20, 1878, its complaint against the Denver Company, in the Third Judicial District

Court of Colorado, Fremont County, claiming that it had complied, in all respects, with the act of Congress of March 3, 1875, and acquired a prior right to construct its road through the Grand Cañon, one hundred feet on each side of its line as surveyed in 1877, and charging that the defendant was interfering with the construction of its road upon that line.

In accordance with the prayer of the bill, an injunction was granted by the State court restraining the defendant from interfering with its further operations in the cañon. That suit, upon the petition of the defendant, was, April 22, 1878, removed into the Circuit Court of the United States for the District of Colorado.

The Denver Company, April 27, 1878, filed its bill in the latter court, against Alling and others, who are designated in the charter of the Cañon City Company as its trustees for the first year, and against the Atchison, Topeka, and Santa Fé Railway Company, charging that the Cañon City Company was not a legally constituted corporation; that the individual defendants, wrongfully claiming to be such corporation, had, by force, occupied the Grand Cañon, and were proceeding to locate their road upon a line in that cañon which the complainant had surveyed in 1871–72, and upon which it had made preparations to resume active work on the 19th of April, 1878; that, although it was in the occupancy of the narrow portion of the cañon, where only one road could be located, the defendants threatened by force to drive away its engineers and servants then working in said cañon, and thereby dispossess it of its located line and grade in the narrow part of said cañon; that the defendants were aided and abetted in said course by the Atchison, Topeka, and Santa Fé Railway Company, who, seeking to build a road from Pueblo, by the valley of the Arkansas, and through said cañon, had to that end confederated with the defendants to compel the complainant to abandon the extension of its railway as authorized by its charter and the act of Congress. The complainant, by its bill, claimed an exclusive right of way through the Big Cañon, upon the line of its survey, and one hundred feet upon each side of its road, and to that effect relief was asked by final decree. In that suit a temporary injunction was granted against the Cañon City Company, restraining it

from occupying or attempting to occupy the Big Cañon, and from, in any way or manner, constructing or attempting to survey, locate, or construct their line of railroad through the cañon, which, for the purposes of that suit, was taken and decreed to begin at what is known as the "Point of Rocks," at the mouth of the cañon, and extending to the twelve-mile bridge. That injunction was subsequently modified and limited in its operation to that part of the cañon known as the Royal Gorge, and the defendant was allowed to enter upon that part of the cañon and grade the same for a railroad, but not to lay ties or rails on any part thereof until the future order of the court.

In the suit instituted by the Cañon City Company, the Denver Company filed a cross-bill, setting up substantially the same facts as in its original bill against Alling and others, and a decree was rendered, which, among other things, recognized the prior right of the former to proceed in the construction and operation of its road through the Grand Cañon, without interference or obstruction, in any way, by the Denver Company, but with liberty to the latter to exhibit its bill in any court of competent jurisdiction to compel the Cañon City Company to so change, locate, and construct its road as to permit the convenient and proper location by the Denver Company of its own road, or to compel the Cañon City Company to permit the Denver Company to occupy the track and roadway of the former company, if at any point in that defile it should be impracticable to conveniently lay down or safely operate two distinct lines of railway. From that decree the Denver Company appealed, and it also appealed from the decree in its own suit, dissolving the preliminary injunction granted to it, and dismissing its bill.

The case was submitted on printed arguments by *Mr. John P. Usher*, *Mr. Hanson A. Risley*, and *Mr. James Grant* for the appellants, and by *Mr. H. M. Teller* and *Mr. Charles E. Gast* for the appellees.

The motions, made after the submission of the case, which are mentioned in the opinion of the court, were argued by *Mr. Sidney Bartlett* and *Mr. E. R. Hoar* in support of them, and by *Mr. Lyman K. Bass* and *Mr. James Grant*, *contra*

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

A preliminary question, presented for our consideration, must be first disposed of.

These causes were determined in the Circuit Court, by final decree, Aug. 24, 1878. Upon stipulation between the parties they were submitted here on the 10th of January last. On the 20th of January it was represented to this court, in proper form, that the Pueblo and Arkansas Valley Railroad Company owned a railroad which, with its branches and extensions, is a continuation, in Colorado, of the line of the Atchison, Topeka, and Santa Fé Railroad Company in Kansas; that certain contracts and arrangements had, with the consent of the appellees in both suits, and after the filing of that stipulation, been entered into between the Denver Company, the Atchison, Topeka, and Santa Fé Railroad Company, and the Pueblo and Arkansas Valley Railroad Company, and had been in part executed after the filing of the printed arguments herein; that by said contracts and arrangements the Atchison, Topeka, and Sante Fé Railroad Company had taken a lease of all the constructed lines of the Denver Company for thirty years from Dec. 1, 1878, and was then in the possession of and operating them; had purchased and received all the railroad supplies and materials of that company; had purchased and transferred to a trustee for its use a majority of all the shares of the capital stock of that company, with an agreement providing for a further purchase and ownership of the remainder of them, and with the further agreement that the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka, and Sante Fé Railroad Company should have the selection of a majority of the directors of the Denver Company, the other third being selected by the bondholders of the latter company; that those contracts and agreements were made with the intent and design of ending all controversies, and especially all competitive construction of railroad lines, between the Denver Company on the one part, and the Atchison, Topeka, and Santa Fé Railroad Company and the roads operated by it, including the Pueblo and Arkansas Valley Railroad Company, on the other part; that, by reason of the premises, the Atchison, Topeka,

said Santa Fé Railroad Company, in its own right, and in connection with the Pueblo and Arkansas Valley Railroad Company, had become and was equitably the owner and entitled to the control of all the affairs, suits, interests, and property of the Denver Company, and especially to the discontinuance of all litigation hostile to the interests of the Atchison, Topeka, and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company. Upon these grounds the Pueblo and Arkansas Valley Railroad Company (the present name of the Cañon City Company), and Alling and others, appellees, moved the court that the stipulation for the submission of these causes, upon printed arguments, be cancelled and discharged, such printed arguments withdrawn from the files, and the appeals dismissed. Upon the part of the Atchison, Topeka, and Santa Fé Railroad Company a motion was submitted that it be allowed to intervene and take charge of these suits in the name of the Denver Company, and appear by its solicitor, on behalf of the appellants, that it may give consent, of record, to the dismissal of the appeals. The trustee referred to in the alleged contracts gave his consent to the motions, and their hearing was set for the 20th of March, this court, in the mean time, suspending any action upon the appeals. At that date the Denver Company appeared by its attorneys and resisted each motion.

Upon the hearing of the motions it appeared, among other things, that on the first day of March, 1879, the Denver Company had issued 85,000 shares of stock, of which the plaintiffs in the motions claimed to own or control a bare majority, — 42,510 shares. It was also shown that, at a meeting of the directors of the Denver Company, held on Feb. 7, 1879, a quorum being present, resolutions were unanimously adopted, declaring that these motions were hostile to the interests of that company; that the claims of the Atchison, Topeka, and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company were unfounded, and their assertion for the fraudulent purpose of depriving the Denver Company, its stockholders and creditors, of valuable rights, interests, and property, without compensation. The resolutions instructed the president and the attorneys of the company not only to

oppose these motions, but, by all legal means, prevent the dismissal of these appeals, or the intervention herein for any purpose of any company or person not a party to the record. They were also required to prosecute the appeals in this court with the utmost diligence. At the argument of the motions, copies of all the contracts, resolutions, and writings relied upon by the respective parties were submitted for our examination. Upon careful consideration of the suggestions of learned counsel, we do not doubt that it is our duty to decline any expression of opinion as to the effect or proper construction of the numerous documents which, it is claimed, give the plaintiffs in the motions the right to have the appeals of the Denver Company dismissed. It is apparent that there are serious differences among the stockholders of that company, not only as to its general policy in the future, but as to the validity and interpretation of the contracts and writings under which the Atchison, Topeka, and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company claim to be equitably the owners, and entitled to the control of the affairs, property, and suits of the Denver Company. We cannot now enter that field of controversy. The present appeals are being prosecuted to final judgment by order of the directors or trustees of the appellant corporation. To them, by law, is committed the management of the property and concerns of the corporation. In all litigation involving the action of the corporation they are its representatives in court. In the discharge of their duties they represent not only the stockholders, but the bondholders and creditors, of the company. Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the company, ought not to be controlled or interfered with by this court, by reason of any thing which appears upon the pending motions. Upon their responsibility as directors and trustees they insist that these causes shall proceed to final judgment, in accordance with the stipulation heretofore made by the parties to the appeals. If, in prosecuting them to final judgment, they violate any trust committed to their hands, or any agreement which is binding upon the corporation and the minority stockholders, remedy may be sought in some court of original jurisdiction, into which, upon proper

pleadings, all persons interested may be summoned. No such proceeding has been instituted, so far as we are informed, and we do not feel at liberty, upon the suggestion of strangers to the decrees appealed from, to go behind the official action of the board of directors or trustees, and, in plain disregard of their wishes, and their directions to counsel, dismiss the appeals, and thereby refuse to consider questions regularly presented for our determination.

The motions are, therefore, denied, and we proceed to an examination of the cases upon their merits, premising that our present duty is limited to a determination of the rights of the parties as they existed when the final decrees were rendered, and as they are manifested in the records before us. If, since these decrees were entered, the Atchison, Topeka, and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, have, by valid contract, acquired a controlling interest in the property, rights, and affairs of the Denver Company, that interest can be asserted by appropriate proceedings, and will not be affected by any thing we may determine upon the issues presented by these appeals.

The several acts of Congress upon which the Denver Company and the Cañon City Company rest their respective claims to priority of right in the Big or Grand Cañon are cited, and the history of the organization of both companies given in the statement of the case. But there are other facts of an important character to which attention will be called in the course of this opinion.

The first question, upon the merits, necessary to be considered is, as to the proper construction of the act of June 8, 1872. In its determination, however, we should not overlook what had previously transpired in the history of the company to which was granted, by that act, a right of way over the public domain. In January and February, 1871, very shortly after its articles of incorporation were filed in the proper office of the Territory, the Denver Company caused a survey to be made of the route through the Grand or Big Cañon of the Arkansas, for the purpose, as declared by the engineer who conducted it, of retaining control of the cañon for that company. That survey, extending through the entire length of

the cañon, is described by him as a "close preliminary;" that is, a line very near location, without an actual location of the curves. But the location of the curves, he testifies, could have been made in his office away from the cañon. With that exception, he pronounces it to have been a complete survey. The line thus surveyed was marked by stakes every hundred feet, numbered consecutively, and at points where it seemed necessary, a plus or stake between the hundred feet was added. Of the work then done, a map and profile were made and returned to the chief engineer of the company, and estimates sent to its general manager. Upon the occasion of that survey, or shortly thereafter, employés of the company, under the direction of its engineer, removed several hundred yards of material, graded several hundred feet at the upper outlet of the cañon, and put up a retaining wall ten to fifteen feet high, and about one hundred yards in length. In January, 1872, the survey was continued west of the cañon for a distance of four or five miles. While these surveys were being made, the company was employed in the construction of its road from Denver to Pueblo, and completed it to the latter place, within a few days after, or about the date of the passage of the act of June 8, 1872. It may also be stated, in this connection, that it completed its road from Pueblo to Labran, within eight miles of Cañon City, about the 1st of October, 1872, and to Cañon City in July, 1875. All this was consistent with a purpose, upon the part of the Denver Company, to avail itself ultimately, and within the time prescribed by law, of the granted right of way through the Grand Cañon.

Of what the company had done, prior to the passage of the act of 1872, towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed. It was aware, we must also presume, of the routes designated in the charter of the company, for the main road and its several branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed is quite clearly indicated by the terms employed in the act of 1872. That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and

branches. In this view, and having due regard to all the circumstances and condition of the company, when the act was passed, we do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress. When such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion. *Railroad Company* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 id. 44; *Leavenworth, Lawrence, & Galveston Railroad Co.* v. *United States*, 92 U. S. 733; *Missouri, Kansas, & Texas Railway Co.* v. *Kansas Pacific Railway Co.*, 97 id. 491.

It is here suggested by counsel for the Denver Company that the surveys made in the Grand Cañon in 1871 and 1872 constituted, without further action on its part, a sufficient location and appropriation of at least that part of the designated route. To this proposition we cannot yield our assent. The right of way through that pass was not, in itself, and separate from the right of way along the whole route, of any special value, except the company surveyed its line and located its road east and west of that defile. The grant was an entirety as to the right of way over all the lands lying on the route designated in the charter of the company, and it would be unreasonable to say that, as to a particular part of that route, a mere preliminary survey was in itself equivalent to a fixed location of the road and an appropriation of the way granted, while as to another part of the general route a similar survey would not be an appropriation of the way granted, unless followed by actual occupation and use for railroad purposes. Any such construction of the statute must be held altogether inadmissible.

When was there, then, an appropriation by the Denver Company of the Grand Cañon within the principle we have stated? In 1877 and 1878 it became evident that that pass was of vital importance to any company desiring to reach the trade and business of the country beyond it, whether to

the west, northwest, or southwest. Discoveries then recently made of mineral wealth in Western Colorado gave it immense pecuniary value in railroad circles, since, as the evidence tends, to establish the occupancy of the Royal Gorge of the Grand Cañon by one line of railroad would practically exclude all competing companies from using it for like purposes, except upon such terms as the first occupant might dictate. From the date of the survey made in 1872, down to April 19, 1878, the record furnishes no evidence that the Denver Company actually occupied that defile for any purpose whatever. On that day, however, Congress having extended the time to ten years from the date of the original act within which to complete its road as far south as Santa Fé, that company did, by its agents, occupy the narrow portion of the cañon known as the Royal Gorge, with the avowed intention of constructing its road upon the line of the surveys made in 1871 and 1872. But during the night of April 19, 1878, the board of directors of the Cañon City Company were convened, and Robinson and Strong, the chief engineer and manager, respectively, of the Atchison, Topeka, and Santa Fé Railroad Company, were elected to the same positions in the Cañon City Company. They made preparations to take immediate possession of the cañon in behalf of the last-named company. Evidence of their diligence and activity in that direction is found in the fact that on the morning of the 20th, as early as four o'clock, a small squad of their employés, nine or ten in number, under the charge of an assistant engineer, swam the Arkansas River, and in the name of their company took possession of the cañon. Under the circumstances, it is not material that they failed to find a rival force in the cañon at such an unseasonable hour. That squad was followed the same day by a large and overpowering force of workmen under the control of Robinson. These movements were succeeded by a suit instituted the same day, in the State court, in the name of the Cañon City Company against the Denver Company, in which an injunction was obtained restraining the latter from occupying or attempting to occupy the cañon for railroad purposes, or from interfering with the Cañon City Company in the construction of its own road therein.

The last-named company now insists that it has the prior

right to occupy and use the cañon for its line of road. In support of this claim, it contends that the other company had lost whatever rights it acquired in the cañon through the imperfect survey of 1871 and 1872, by its long inaction after the construction of the road to Cañon City, and by its failure, within a reasonable period, to follow up those surveys by actual location and occupancy for railroad purposes. The conduct of the Denver Company, it is urged, evinced a settled purpose upon its part to abandon its grant of a right of way through that cañon. The answer to all this seems very obvious.

The surveys of 1871 and 1872, although defective in some particulars, and not equivalent to an actual location or appropriation of the way, were quite as complete and extended as the survey which the Cañon City Company caused to be made in 1877. The evidence shows, beyond all question, that when the latter survey was made there was seen in the cañon all or very many of the stakes which the engineer of the Denver Company had put there in 1871 and 1872. Those who made the survey in 1877 undoubtedly knew when, by whom, and for what purpose those stakes had been there placed. Nor had they sufficient reason to suppose that the Denver Company had finally abandoned its purpose of constructing a road through the cañon. We have already referred to the completion of the road from Denver to Pueblo, and from Pueblo to Cañon City, by July, 1875. In 1873, the Denver Company commenced the construction of one of its branches, — the Denver and Southern Railway. Commencing at Pueblo, it completed that road to Cucharas, fifty miles from Pueblo, by February, 1876; to Garland, sixty miles from there, by August, 1877; and to the valley of the Rio Grande, by July, 1878. After July, 1875, the company, it is true, suspended active work upon the line west of Cañon City. But the cause of such suspension, as its officers testify, was the widespread depression in business and financial circles, and the belief, shared by all interested in the prosperity of the company, that the extension of the line southward from Pueblo gave promise of quicker returns and more immediate results in every way. They state that it was the purpose of the company to resume work upon its line through the cañon as soon as the necessary means therefor could be obtained, and

that there was no intention at any time to abandon the route west of Cañon City. Their delay in the construction of the road west of Cañon City and through the Grand Cañon seems to have been in the interest of the stockholders they represented, and not inconsistent with an honest purpose, within the period fixed by law, to meet the objects for which Congress granted to it the right of way. Its surveys of 1871–72, followed by an occupancy of the cañon on the 19th of April, 1878, in advance of the Cañon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver Company then, if not before, came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872, and was entitled to have secured against all intruders whatever privileges or advantages belonged to that position.

But the important question remains as to the effect of the act of March 3, 1875, granting the right of way through the public lands of the United States to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States. The explicit language of that act leaves no doubt as to its object. It declares "that any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any cañon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said cañon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade." At the date of that act the road of the Denver Company, as we have seen, had not been located through the Grand Cañon of the Arkansas. But it had a subsisting grant of a right of way through that defile. According, therefore, to the act of March 3, 1875, the Cañon City Company, if it belonged to the class described in the first section of the act, might, for the purposes of its road, occupy and use that cañon in common with the Denver Company.

Upon this branch of the case, the first contention of the latter company is that the Cañon City Company was not "duly organized" under the laws of Colorado, and, therefore, by the terms of the act of March 3, 1875, was not entitled to

its benefits. But this objection is not well taken. The articles of incorporation filed by that company seem to be in substantial compliance with the statutes of Colorado. This objection need not be further considered.

But its right to claim the benefit of the act of March 3, 1877, is impeached upon the further ground that it was not organized in good faith, for the purpose of constructing a road, for itself, but was the mere instrument of the Atchison, Topeka, and Santa Fé Company, by whom the real work of construction through the cañon was carried on. It is not to be doubted, under the evidence, that the Atchison, Topeka, and Santa Fé, Railroad Company is the active power behind all the movements made in the name of the Cañon City Company for the occupation of the cañon, and that the former company, or some of its stockholders, were deeply interested in the success of the movement to drive the Denver Company from the Grand Cañon. But the Cañon City Company is none the less a railroad company, duly organized under the laws of Colorado. It is, therefore, embraced by the very letter of the act of March 3, 1875. We are unable to perceive upon what sound principle the courts can go behind its regular and lawful organization, and exclude it from the rights granted by that act, because in the prosecution of its work it derives assistance or accepts aid from another corporation, with which it may choose to share the benefits secured under the act of Congress.

Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Cañon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fé, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the

19th of April, 1878, to take possession of the Grand Cañon, and prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the act of March 3, 1877, it must be held to have assented to the provisions of the act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the cañon, for the purpose of its road, in common with the road first located. At the time of the passage of the act of March 3, 1875, Congress had become convinced of the importance to the country, and particularly to the Western States, of preserving cañons, passes, and defiles in the public domain for the equal and common use of all railroad companies organized under competent State or territorial authority, and to which might be granted by national authority the right of way. We may well presume that the extension of time accorded to the Denver Company by the act of March 3, 1877, would not have been given except subject to the conditions contained in the act of March 3, 1875. This conclusion renders it unnecessary that we should, in this case, consider whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Cañon within five years after the passage of the act of June 8, 1872.

It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Cañon. The decree, as entered, can only be sustained upon the assumption that the Cañon City Company had by prior occupancy acquired a right superior to any which the Denver and Rio Grande Railway Company had to use the cañon for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by the acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other company. Where the Grand Cañon is broad enough to enable both companies to proceed without interference with each other in

the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road. Further, if in any portion of the Grand Cañon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 3, 1875, to use the same road-bed and track, after completion, in common with the Denver Company.

The decrees in these causes are, therefore, reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each suit, the court below will recognize the prior right of that company to occupy and use the Grand Cañon for the purpose of constructing its road therein, and will enjoin the Cañon City and San Juan Railway Company, its officers, agents, servants, and employés, from interfering with or obstructing that company in such occupancy, use, and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the decrees appealed from, the Cañon City and San Juan Railway Company has, under the authority of the Circuit Court, constructed its road-bed and track in the Grand Cañon, or in some portion thereof. In that event, the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad purposes may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

The court will make such further orders as may be necessary to give effect to this opinion.

MR. CHIEF JUSTICE WAITE dissenting.

I dissent from the judgment in this case. In my opinion

the grant of the right of way to the Denver and Rio Grande Company, contained in the act of June 8, 1872, is no more than a license to enter upon and use such of the public lands of the United States as should be unoccupied and not appropriated to other purposes when the permanent location of its road with a view to actual construction should be made. Words which, in a grant of land to aid in building a railroad, imply a present grant need not necessarily have that effect in a grant of right of way only.

I think, also, the Cañon City and San Juan Company made the first permanent location with a view to actual construction through the pass in controversy. Consequently it secured the preference of routes, subject to a reasonable use of the route it occupied, if necessary, by the Denver Company in common with itself.

MONTGOMERY v. SAMORY.

A court in Louisiana, having jurisdiction of the parties and the subject-matter of the suit, rendered a judgment in favor of the plaintiff for a debt, with lien and privilege on the lands described in the mortgage given by the defendant to secure it. The judgment, on a devolutive appeal by the defendant, was in all things affirmed by the Supreme Court of the State. Pending the appeal, the lands were sold by the sheriff under the judgment, and purchased by the plaintiff, who obtained a monition under the act for the further assurance of titles to purchasers at judicial sales. Due publication of said monition having been made, and there being no opposition to said sale, the proper court ordered that the same "be confirmed and homologated according to law." A suit was subsequently brought in the Circuit Court of the United States by the heir-at-law of the mortgagor, praying that the title of the purchaser at said sale be decreed to be null and void, and that the complainant be adjudged to be the true and lawful owner of the lands. *Held*, that the judgment in the proceedings on the monition is conclusive proof of the validity of the sale, and, as *res adjudicata*, is a complete bar to the suit.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Thomas Hunton for the appellant.

Mr. Philip Phillips and *Mr. Henry C. Miller*, *contra*.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Courts and jurists everywhere agree that the title to real estate is governed by the laws of the place where it is situated, the universal rule being that the title to such property can only be acquired, passed, or lost according to the *lex loci rei sitæ*. Story, Confl. Laws (6th ed.), sect. 424; Wharton, Confl. Laws, sect. 273.

Enough appears in the record to show that the father of the minor plaintiff owned the property in controversy, and that he being indebted to the defendant in the sums expressed in the four promissory notes referred to in the transcript, executed to his creditor the two mortgages under which the defendant claims that he ultimately acquired his title to the premises. Under the law of Louisiana, where the property is situated, the mortgages imported a confession of judgment for the amount which they were executed to secure, less what should be paid before breach of condition.

Default of payment having subsequently been made, the mortgagee filed his petition in the third district court, praying that the mortgagor might be summoned to answer and that he should be decreed to pay the amount of the debt secured, with mortgage privilege upon the property described in the mortgages. Process was issued, and the sheriff returned "not found," and that the mortgagor was out of the State. Due proceedings followed, which were that the mortgagee filed a supplementary petition setting forth the return of the sheriff, and prayed that a *curator ad hoc* might be appointed, and that he should be served with a proper citation. Pursuant to the prayer of the petition, the court made the requested appointment, and the curator having been duly served, appeared and filed an answer. Hearing was had, and judgment was entered for the mortgagee in accordance with the prayer of the petition.

Two years later the mortgagor filed his petition in the court, complaining that the judgment had been rendered against him without his having been previously cited to appear, as the law directs, and prayed for a devolutive appeal, which was seasonably granted by the court. Both parties appeared in the Supreme Court of the State, and the appellant having sug-

gested the death of the mortgagor and that his widow had been confirmed as natural tutrix of her minor child, she, the tutrix, was made a party to the appeal.

More than a year had elapsed from the date of the judgment before the petition for an appeal was filed, but it was obtained under that provision of the code which makes an exception in favor of absentees, to whom a delay of two years is granted. *Lambert* v. *Conrad*, 18 La. Ann. 145.

Record proof showed that the mortgagor was an absentee, and the appeal was taken to enable the appellant to contest the point that the service on the *curator ad hoc* was sufficient to put the rights of the absentee in issue in the foreclosure proceedings. All matters of the kind were necessarily in issue, and the parties having been fully heard, the court affirmed the judgment of the subordinate court.

Pending the appeal, which was devolutive only, the property was sold under an execution issued on the judgment rendered in the court of original jurisdiction, and the mortgagee became the purchaser at the sheriff's sale. By the record it also appears that on the 10th of March of the next year, and before the appeal was determined, the mortgagee and purchaser at the sale applied to the same district court for a monition to protect his title thus acquired, as he was authorized to do under the law and jurisprudence of the State. Rev. Stat. La. 469. Publication as required by law was duly made, and such regular proceedings followed as terminated in a judgment in favor of the mortgagee and purchaser, that the said sale be confirmed and homologated according to law.

Seven years subsequently, to wit, on the 29th of March, 1871, the widow of the mortgagor, as tutrix of the minor plaintiff, filed her petition in the Circuit Court of the United States, praying the court to enter a decree that the title to the property acquired by the "mortgagee and purchaser at the sheriff's sale is null and void." Due process was served; and the respondent appeared and filed an exception to the jurisdiction, which having been overruled by the court, the respondent filed an answer, setting up several defences.

Eight peremptory exceptions were also filed by the respon-

dent at a later period. Testimony was not taken by either party, and they, having waived a trial by jury, submitted the cause to the court. Arguments of counsel followed the agreement to submit the cause; and the court, the district judge presiding, rendered judgment in favor of the plaintiff, holding that the judgment of the Third District Court of the city is null and void. Immediate application for a new trial was made, and the same court, at a subsequent session, the circuit and district judges presiding, granted the application. Leave being granted, the plaintiff filed an amended and supplemental petition, in which she alleged two other grounds of claim: 1. That the property, at the date of the judgment in favor of the mortgagee and at the time of the sale, was in possession of the United States as abandoned property. 2. That there never was any valid or legal seizure of the property.

Four peremptory exceptions were filed by the defendant to the supplemental and amended petition: 1. That it changes entirely the cause of action and the demand set forth in the original petition. 2. That it alters the plaintiff's pleadings and the basis and foundation of the suit. 3. That it is vague and general, without any clear and precise statement of the claim. 4. That it changes the substance of the demand, the ground of claim, and the defence.

Those exceptions were heard separately from the other questions in the case, and having been overruled by the court, the defendant filed what is denominated in the record an exception and answer to the supplemental and amended petition, as follows: 1. That the petition sets forth no cause of action. 2. That the cause of action is barred by the prescription of five years. 3. That the exceptions pleaded to the original petition are a bar to the supplemental petition. 4. That it is not true that the property was in the possession of the United States, as alleged. 5. That the sheriff did legally seize the property, and that the title of the defendant is just and legal.

Formal application was made to set aside the agreement to waive a trial by jury, but it does not appear that it was pressed, and it was never granted. Instead of that, the record shows that the questions involved were reargued by the counsel on each side, and that the court entered judgment that the excep-

tions filed by the defendant be sustained, and that the plaintiff's suit be dismissed with costs. Exceptions in the usual form as at common law were filed by the plaintiff to the rulings and decisions of the court, and she sued out the present writ of error.

Two errors are formally assigned, to the effect as follows: 1. That the court, in view of the facts alleged in the pleadings, erred in deciding the cause without the intervention of a jury. 2. That the court erred in maintaining the peremptory exception of *res judicata*, and the peremptory exception that the judgment of the Third District Court confirming and homologating the sale made to the defendant, operates as a complete bar to the plaintiff's claim.

Beyond question, both of these peremptory exceptions were filed before the new trial was ordered; but inasmuch as they were subsequently sustained by the Circuit Court, and are embodied in the bills of exceptions exhibited in the record, they are properly here for re-examination under the present writ of error.

Viewed in that light, it follows that there are three questions presented for decision: 1. Whether the court erred in not submitting the case to a jury. 2. Whether the court erred in holding that the judgment of the Third District Court is conclusive that the sale was made according to law, and that such a judgment cannot be incidentally and collaterally attacked or annulled. 3. Whether the court erred in holding that the judgment of the Third District Court, pursuant to the process of monition, operated as a complete bar to the present suit.

Other questions were litigated in the progress of the suit; but inasmuch as these three are the only ones included in the formal assignment of errors, none other will be much considered.

Peremptory exceptions, in the jurisprudence of that State, are of two classes, of which the first is equivalent in import to a demurrer at common law, and of course must in all cases be adjudged by the court. Somewhat different rules apply in the second class, which, without going into the merits of the cause, show that the plaintiff cannot maintain the action either because it is prescribed or because the cause of action has been destroyed

or extinguished. Code of Prac. 1870, art. 345. Such an exception may be pleaded in every stage of the litigation previous to the definitive judgment, but the rule is that it must be pleaded specially, and that sufficient time must be allowed to the adverse party to make defence. Id. art. 346.

Nothing can be plainer in legal decision than the proposition that the two exceptions mentioned were well pleaded in the Circuit Court, as appears by the sixth and seventh articles of the answer which the defendant filed to the suit of the plaintiff. Conclusive support to that proposition is also found in the opinions of the Supreme Court of the State, set forth in the transcript and officially reported. *Samory* v. *Montgomery*, 19 La. Ann. 333; *Same* v. *Same*, 27 id. 50.

Much discussion of the first assignment of error is unnecessary, for two reasons: 1. Because the issues presented under the peremptory exceptions were issues of law for the determination of the court. 2. Because the parties waived a jury trial by consent, and stipulated that the case should be tried by the court.

Two judgments properly certified were introduced by the defendant in support of his peremptory exceptions, of which the first was the judgment of the Third District Court foreclosing the mortgages, as affirmed in the Supreme Court. Attempt is made to assail that judgment upon the ground that the absence of the mortgagor under the circumstances did not justify the appointment of a *curator ad hoc*, and the subsequent proceeding which followed that appointment.

Good reasons exist to conclude that the question argued here is the exact question which was presented to the Supreme Court of the State to which the case was appealed from the Third District Court. In disposing of the case the Supreme Court said that the only question presented was whether the mortgagor, at the time the service was made, was an absentee in legal contemplation, to whom a *curator ad hoc* could be appointed, and contradictorily with whom a suit might be prosecuted and a valid judgment obtained against the absent person. Such is the statement of the judge who gave the opinion, and the facts disclosed confirm the statement and show to a demonstration that the exact question presented

here was fully and expressly decided by that court. *Samory* v. *Montgomery*, *supra*.

Proof of a conclusive character is exhibited in the record to show that the parties in this case waived a trial by jury; but it is not necessary to rest the case upon that proposition, as it is clear that the issue presented by the peremptory exception was one of law and not of fact; nor does it make any difference that the parties stipulated that the court should find the facts, as the record shows that the judge presiding when the first judgment was rendered complied with that part of the stipulation. His finding of facts was before the two judges when the new trial was granted, and constituted the foundation of the court's action.

New pleadings were subsequently filed by both parties, which presented issues of law for the determination of the court, arising out of the duly certified copy of the judgment rendered in the Third District Court foreclosing the mortgage as affirmed by the Supreme Court of the State, and the monition judgment of the same court, from which no appeal was ever taken.

Viewed in any light, it is clear that the first assignment of error must be overruled.

Res judicata, as pleaded in the sixth peremptory exception of the defendant, is in substance and effect the same as the plea in bar of a former recovery at common law, in respect to which, in order that it may be a valid defence and incapable of collateral attack, it must appear that the opposite party had notice of the suit, and that the court rendering the judgment had jurisdiction of the case. Judgments, in the jurisprudence of that State, as well as elsewhere, are open to inquiry as to the jurisdiction of the court and notice to the defendant. *Christmas* v. *Russell*, 5 Wall. 290; *Webster* v. *Reid*, 11 How. 437.

Definitive judgments, where the court has jurisdiction, and due notice is given to the defendant, bear the force of *res judicata*, and of course are conclusive of the rights of the parties. Civil Code, art. 539.

Jurisdiction of the Third District Court is admitted, and sufficient has already been remarked to show that the defendant was an absentee, and that the notice given to the *curator ad*

hoc was a sufficient compliance with the requirement of law. Decisive proof of that proposition is found in the fact that he went voluntarily out of the jurisdiction, under circumstances that show that he cannot complain of legal proceedings regularly prosecuted against him in his absence. *Ludlow* v. *Ramsey*, 11 Wall. 581; *University* v. *Finch*, 18 id. 106.

When judgment was rendered for the mortgagee in the Third District Court, the mortgagor appeared and filed a petition for a devolutive appeal to the Supreme Court, which was granted for the reasons set forth in the petition, which plainly showed that the prior action of the court in appointing the *curator ad hoc* was correct.

Such an appeal does not operate as a *supersedeas*, and the mortgagee and purchaser of the property in the mean time applied to the clerk of the court, in whose office the deed of sale was recorded, for a monition or advertisement in conformity to an act of the legislature of the State, entitled "An Act for the further assurance to purchasers at judicial sales," and praying that the process might be granted requiring all parties alleging any informality or irregularity in the said sale to show cause, if any they had, why the sale should not be confirmed and homologated. Advertisements as required were duly published; and, no opposition appearing, the court rendered judgment that the said sale be confirmed and homologated according to law, as authorized by the legislative act, from which judgment no appeal was ever taken, and the record shows that the said judgment is in full force and unreversed. *Waters* v. *Smith*, 25 La. Ann. 515.

Purchasers at judicial sales may protect themselves from eviction of the property so purchased, or from any responsibility as possessors of the same, by pursuing the rules prescribed in that enactment. They must sue out the monition and advertise as required, calling on all persons who set up any right to the property in consequence of any informality or irregularity in the order, decree, or judgment, or in the appraisement, advertisement, or proceedings of the sale, or any defect whatsoever, to show cause within thirty days why the sale so made should not be confirmed and homologated.

Monitions of the kind must state the judicial authority under

which the sale took place, and must contain the same description of the property purchased as that given in the judicial conveyance to the buyer, and must also state the price at which the object was bought. Buyers may apply for the process; and the judges of the courts from which the orders, decree, or judgment were issued may grant the same in the name of the State, and affix to it the seal of the court. Thirty days having expired, the party may apply to the judge of the court out of which the monition issued, to confirm and homologate the sale; and, if no cause is shown to the contrary, it shall be the duty of the judge to enter such a judgment or decree.

Provision is also made that the judgment of the court shall be in itself conclusive evidence that the monition was regularly made and advertised; nor shall any evidence be received thereafter to contradict the same, or to prove any irregularity in the proceeding. Evidence to prove any such irregularity is declared to be inadmissible; and the further provision is that the judgment of the court confirming and homologating the sale shall have the force of *res judicata*, and that it shall operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property in consequence of any illegality or informality in the proceeding, whether before or after judgment. Appended to that is the further provision that the judgment of homologation shall in all cases be received and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced in the interest of parties duly represented. Rev. Stat. La. 1870, 469, arts. 2370 to 2376, inclusive.

Irregularities in the suit of foreclosure under which property is sold for breach of condition may be conclusively validated by such proceeding, if the court which rendered the decree had jurisdiction of the case and the record shows that the party defendant was duly notified of the suit; but the better opinion is, that if the court had no jurisdiction in such a case, or if the process was not duly served, the proceeding under the statute authorizing the monition will not cure the defect. *Willis* v. *Nicholson et als.*, 24 La. Ann. 545; *Fix* v. *Dierker*, 30 id. 175; *Frost* v. *McLeod*, 19 id. 69.

Concede that, and still the concession will not change the conclusion in this case, as the jurisdiction of the court in the foreclosure proceeding is beyond question, and the decisions of the State court prove incontestably that the notice to the *curator ad hoc* was sufficient to support the judgment or decree against the defendant as an absentee from the State.

Apply those rules to the case before the court, and it is clear that the judgment in the monition proceeding affords conclusive proof that the judicial conveyance of the property vested a complete title in the purchaser at the sheriff's sale. Should it be suggested that the judgment rendered in the monition proceeding was subsequent to the appeal from the Third District Court, the conclusive answer to the objection is that the devolutive appeal never operates as a supersedeas. *Arrowsmith* v. *Durell*, 21 Law Ann. 295; *Walker* v. *Hays*, 23 id. 176; *Samory* v. *Montgomery*, 27 id. 50; Code of Prac., arts. 578, 595; Rev. Stat. La., art. 3392.

Tested by these authorities, it is clear that the appeal constituted no legal obstacle to the subsequent jurisdiction of the subordinate court in rendering the judgment in the monition proceeding, from which it follows that there is no error in the record brought here by the present writ of error.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE BRADLEY did not sit in this case, nor take any part in deciding it.

UNITED STATES *v.* SIOUX CITY AND PACIFIC RAILROAD COMPANY.

The ruling in *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), that the United States is not entitled to recover if, during the period for which it claims the five per cent of the net earnings of any road, to aid in the construction of which the bonds of the United States were granted under the Pacific Railroad acts, such earnings were absorbed by the interest accruing on the first-mortgage bonds of the company, reaffirmed.

ERROR to the Circuit Court of the United States for the District of Iowa.

The facts are stated in the opinion of the court.

The Attorney-General and *Mr. Joseph K. McCammon* for the plaintiff in error.

Mr. S. Bartlett and *Mr. W. I. Hayes, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by the United States against the defendant in the court below to recover five per cent of its net earnings.

The facts of the case were admitted by the parties, and, amongst others, the following: —

"5. That if the amount paid by the company as hereinbefore stated for interest on its first-mortgage bonds during said time should, under the law, be deducted from the receipts of the company in order to ascertain the net earnings thereof, then there were no net earnings during said time; but if, on the other hand, the said payments of interest should not be deducted from the earnings of the road to ascertain the net earnings, then the net earnings of the road during said period amounted to the sum of four hundred and seven thousand seven hundred and ninety-nine $\frac{50}{100}$ dollars ($407,799.50)."

It thus appears that, although the company made net earnings to the amount of $407,799.50, during the period covered by the time in respect of which the suit was brought, yet that they were all absorbed by the interest accruing on the first-mortgage bonds. According to the principles laid down in our decision, *Union Pacific Railroad Co.* v. *United States* (*supra*, p. 402), the government cannot claim the five per cent which would otherwise be applicable to its subsidy.

Judgment affirmed.

MR. JUSTICE STRONG and MR. JUSTICE HARLAN dissented.

CLARK v. UNITED STATES.

A. residing in New Orleans and B. in Mobile during the whole rebellion, consigned cotton which they owned to C., a supervising special agent of the Treasury Department. It arrived at Mobile on the last of July or the first of August, 1865, when it was claimed by them. It was consigned to him to facilitate its arrival, as the government had at that time charge of the railroads. C. having received orders from the Treasury Department to ship all cotton received by him, shipped in the latter month that of A. and B. to New York, where it was sold. The net proceeds were paid into the treasury. A. and B. brought suit for them against the United States in the Court of Claims, March 27, 1872. *Held*, that the suit was barred by the Statute of Limitations.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter and *Mr. John J. Weed* for the appellant.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal from the Court of Claims. The facts of the case cannot be more clearly or compactly stated than they are presented in the findings of the court.

The findings are as follows: —

"In July and August, 1865, the petitioners, James S. Clark and Edward Fulton, were merchants and copartners doing business at New Orleans, under the firm name and style of J. S. Clark & Co., and Joseph C. Palmer was a merchant at Mobile.

"In said July and August the petitioners were the owners jointly of nine hundred bales of cotton, which arrived at Mobile in the last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising special agent of the Treasury Department for the department of Alabama.

"At the times above stated the government had charge of the railroads, and the cotton was consigned to Mr. Dexter to facilitate its arrival at Mobile, and on its arrival there it was claimed of him by the petitioners.

"In August, 1865, Mr. Dexter having received orders from the Treasury Department to ship all the cotton received by him, shipped the said nine hundred bales to New York, where it arrived and was sold by the United States, and the net proceeds thereof, amounting to $127,350, were paid into the treasury.

"The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872."

The United States rely upon two defences: —

1. That the petitioners did not, within two years after the suppression of the rebellion, prefer their claim in the Court of Claims.

This limitation is prescribed by the "Act for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts of the United States," passed March 3, 1863. 12 Stat. 863. It is confined to cases arising under that act.

2. That the petition was not filed in the Court of Claims within six years after the cause of action accrued.

This limitation is found in the tenth section of the act relating to the Court of Claims, also of March 3, 1863. 12 Stat. 765. That section enacts: —

"That every claim against the United States cognizable by the Court of Claims shall be for ever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues: *Provided*, that claims which have accrued six years before the passage of this act shall not be barred, if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided further*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years, first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the disability had ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

In the Revised Statutes of 1874, sect. 1009, the first proviso was dropped. It was then needless, the time of the saving thereby created with respect to the claims to which it related having before expired.

The counsel of the appellants have contended, in an argument of unusual research and ability, that the cotton in question was not captured or abandoned property within the meaning of the act upon that subject, and that hence the limitation in that act has no application to this case. Our view renders it unnecessary to consider this point. We therefore pass from it without further remark. The only question to be considered is whether the action is barred by the limitation of six years in the Court of Claims act before referred to.

Nothing can be clearer than the terms of the limiting section.

It begins by declaring that every claim cognizable by the court "shall be for ever barred" unless the petition "shall be filed within six years after the claim first accrued." Then follows the proviso naming the disabilities which shall arrest the running of the statute, and either of which shall give three years for the filing of the petition "after the disability has ceased." Finally, it is enacted that "no other disability shall prevent any claim from being barred, nor shall any of said disabilities operate cumulatively."

It is not claimed that any of the disabilities named affected *either of the appellants*.

In the early part of April, 1862, New Orleans was captured by the naval forces of the United States under the command of Admiral Farragut. On the 1st of May following the national military forces under the command of General Butler took possession of the city. It was never afterwards in possession of the insurgents. *Desmare* v. *United States*, 93 U. S. 605. The appellants resided there. It is a part of the public history of the country, of which we are bound to take judicial notice, that from the time last mentioned communication between that place and the seat of the national government was constant and uninterrupted.

In the case just referred to, this court said: "Upon the issuing of General Butler's proclamation, the legal *status* of New

Orleans and its inhabitants with respect to the United States became changed. Before that time the former was enemy's territory and the latter were enemies. . . . General Butler's proclamation was proof of the subjugation of the city and the re-establishment of the national authority. The hostile character of the territory thereupon ceased, and the process of rehabilitation began. The inhabitants were at once permitted to resume, under the regulations prescribed, their wonted commerce with other places, as if the State had not belonged to the rebel organization. *The Venice*, 2 Wall. 258. But they were clothed with new duties as well as new rights."

The cotton was shipped to New York in August, 1865, and there sold, and the proceeds paid into the treasury of the United States. The claim then first accrued. The petition was filed on the 27th of March, 1872. This was at least six months in excess of the six years limited by the statute.

During all this period the appellants could easily have put the proper machinery of the law in motion. The delay is unaccounted for.

The supplementary briefs filed by the parties since the argument at the bar do not, we think, call for any special remarks.

The case is clearly within the bar of the statute, and we are constrained to hold accordingly.

Judgment affirmed.

SHERRY v. MCKINLEY.

The rulings in *De Treville* v. *Smalls* (98 U. S. 517) and in *Keely* v. *Sanders* (*supra*, p. 441) reaffirmed.

ERROR to the Supreme Court of the State of Tennessee.

This is a bill filed by McKinley and others in the Chancery Court of Shelby County, Tennessee, and for the purposes of the case it was conceded that they were the owners of two lots of ground near Memphis, in that county, prior to the tax sale thereof, June 22 and June 25, 1864, under the act of Congress for the collection of direct taxes in insurrectionary districts

within the United States and for other purposes, and the acts amending the same. Tax-sale certificates in due form were granted by the commissioners to Sherry, the purchaser at said sale. The complainants alleged that the sales were null and void, because the said acts of Congress were unconstitutional; that the assessment was excessive; that the commissioners put the act in force before the military occupation of the whole of said county by the United States; that the sales were not sufficiently advertised; and that although the day fixed in the advertisement was June 13, 1865, the lots were not in fact sold until the 22d and 25th of that month. The bill prayed that the sales be set aside. The defendants answered. The court passed a decree in conformity with the prayer of the bill. The Supreme Court, on appeal, decreed that the tax commissioners in making the sales did not follow the acts of Congress in this, that the military authority of the United States was not established throughout the county of Shelby when they entered upon the discharge of the duties of their office; that the sales were therefore void; that the certificates be cancelled and held for naught; that the possession of the property be restored to the complainants; and that an account of the rents and profits be taken. Thereupon Sherry sued out this writ of error.

Mr. William M. Randolph for the plaintiff in error.
Mr. J. B. Heiskell, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

Most of the questions presented in this record received our consideration in *Keely* v. *Sanders* (*supra*, p. 441), to which we refer. We shall not repeat what was there said. The sole ground upon which the Supreme Court of the State rested its decree declaring the tax sales to be invalid was that the military authority of the United States had not been established throughout the county of Shelby when they took place, and, therefore, that the lots were not then subject to sale according to the provisions of the act of Congress. That this ground cannot be maintained, we held in the former case.

That both the lots were subject to the tax, and that it had not been paid or they redeemed, is not controverted. It is also in evidence, and not denied, that the commissioners gave a

certificate of sale of each of the lots to Sherry, the purchaser. What the effect of that certificate is we determined in *Keely* v. *Sanders*, as also in *De Treville* v. *Smalls*, 98 U. S. 517. If it be suggested (though it has not been during the argument) that the sale of lot 32 was of a different lot from that claimed by the complainants, it may be replied, that the suggestion is in conflict with the proof.

It is true it was mentioned as "part of Manly tract," which was an obvious mistake that could have misled no one; for there was no such tract, and the remaining portion of the description clearly identified the property. It was as follows: "Lot 32. . . . Six and fifty-eight one-hundredths acres ($6\frac{58}{100}$) assessed to heirs of McKinley (the complainants) in 1860. Fifth civil district (country)."

It is a fair presumption that the description was taken from the State assessment of 1860, and followed it, since there is no evidence to the contrary. The number and the designation of owners are correct. No doubt the description would be sufficient in a deed, since it afforded the owners the means of identification, and could not have misled them. Cooley, Const. Lim. 282.

The objection that the sales were not sufficiently advertised is met in the cases we have heretofore decided. But in truth they were advertised four weeks before they were made. The tax sales in the district were advertised to commence on the 13th of June, and to continue from day to day until all the lands not redeemed from forfeiture were sold. The sales of the lots now in controversy were made confessedly more than a month after they had been advertised for sale. *Lorain* v. *Smith et al.*, 37 Iowa, 67.

It is to be presumed that the sales were adjourned from day to day until June 25. At most, there was but an irregularity which the act of 1863 rendered ineffective to defeat the title of the purchaser.

The judgment of the Supreme Court will be reversed, and the record remitted with instructions to order a dismissal of the bill; and it is

So ordered.

MR. JUSTICE FIELD dissented.

WILSON v. SALAMANCA.

1. Bonds of a township in Kansas payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity, as its legal representatives. They recite that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature which is therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a *bona fide* holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. *Held*, that it is not a defence to the action that at the time of voting and that of issuing the bonds their entire amount was in excess of the proportion which by law they should bear to the taxable property of the township, or that after the vote at said election had been cast in favor of subscribing for stock in B., a railroad company, the subscription was made for stock in A., and said bonds issued in payment therefor, B. having, under a law existing at the time of said election, become merged and consolidated with A. to form a continuous line of road.
2. This case distinguished from *Harshman* v. *Bates County*, 92 U. S. 569.

ERROR to the Circuit Court of the United States for the District of Kansas.

This was an action brought by William C. Wilson against Salamanca Township of Cherokee County, Kansas, on three hundred and twenty-one interest coupons detached from bonds, issued by it to the Memphis, Carthage, and Northwestern Railroad Company, to aid in the construction of its road. The bonds, with the certificate of the auditor of state indorsed thereon, are in the following form: —

"UNITED STATES OF AMERICA.

"STATE OF KANSAS, COUNTY OF CHEROKEE.

"*Salamanca Township Bond.*

"No. 149.] Interest ten per cent per annum. [$500.

"Know all men by these presents, that the municipal township of Salamanca, in the county of Cherokee and State of Kansas, acknowledges itself indebted and firmly bound to the Memphis, Carthage, and Northwestern Railroad Company, or bearer, in the sum of $500, which sum the said township of Salamanca, for value received, hereby promises to pay said company, or bearer, at the

National Park Bank in the city of New York and State of New York, twenty years after date, with interest thereon from the date hereof, at the rate of ten per centum per annum, payable annually on the first day of September of each year, on the presentation and delivery at said National Park Bank, in said city of New York, State of New York, of the coupons of interest hereto attached.

"This bond is issued pursuant to an order of the proper officers of said township made by authority of an act of the legislature of the State of Kansas, entitled 'An Act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of said bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872, and ordered by the qualified electors of said township at an election duly held.

"In testimony whereof, the said township of Salamanca has executed this bond by the township trustee of said township, under the order of the proper officers of said township, signing his name hereto, and by the township clerk of said township, under like order, attesting the same, and affixing hereto his name.

"Done this second day of September, A.D. 1872.

"JOHN RALEY,
"*Township Trustee of Salamanca Township, Cherokee County, Kansas.*

"Attested by W. O. BRANNIN,
"*Township Clerk of Salamanca Township, Cherokee County, Kansas.*"

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office, in accordance with an act of the legislature entitled an act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith. Approved March 2, 1872.

"Witness my hand and official seal, this eleventh day of October, 1872.

"A. THOMAN,
[SEAL.] "*Auditor of State.*"

The coupons are in the following form: —

"$50.] COLUMBUS. [$50.

"The township of Salamanca, Cherokee County, Kansas, promises to pay the sum of fifty dollars on the first day of September, A.D. 1873, being interest on bond No. 149, for $500, payable at the National Park Bank in the city and State of New York.

"W. O. BRANNIN,
"*Township Clerk of Salamanca Township, Cherokee County, Kansas.*"

The statute of Kansas of Feb. 25, 1870 (Laws of Kansas, 1870, 189), to enable municipal townships to subscribe for stock in any railroad, provides that the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent per annum on the taxable property of such township, to pay the yearly interest on the amount of bonds issued.

The material provisions of the statute of March 2, 1872 (Laws of Kansas, 1872, 110), which is mentioned in the bonds and certificate of the auditor, are as follows: —

"SECT. 1. That the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk, and treasurer of any municipal township in this State, are hereby empowered to issue the bonds of such county, city, or township, in any sum necessary, not greater than ten per cent, inclusive of all other bonded indebtedness of the taxable property of such county, city, or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power, by donation thereto, or the taking of stock therein, or for other works of internal improvement. . . . *Provided further*, that under a proposal for aid to any railroad, any township having less than $200,000 taxable property may issue in addition to the ten per cent authorized in this section, ten per centum of an amount equal to the number of miles of railroad (agreed under such proposal to be constructed within such township) multiplied by six thousand. *And provided further*, that the limit prescribed in this section shall not apply and be considered to restrict or prevent the issuing of any bonds heretofore voted, or vote now pending, in any county or township in this State, and which bonds may not have yet been issued; but that the limit herein shall only be considered as applying only to the issuing of bonds to be hereafter voted under this law."

Sect. 2 provides when and where such bonds shall be payable. "And (such bonds) if issued by a township shall be signed by the township trustee and attested by the township clerk."

"SECT. 3. Before any bonds shall be issued, as herein provided, the same shall be ordered by a vote of the qualified electors of such county, city, or township."

"SECT. 12. The officers of any county, city, or township . . . shall at the time of issuing the same (such bonds) make out and transmit to the auditor of State a certified statement of the number, amount, and character of the bonds so issued, to whom issued and for what purpose, which statement shall be attested by the clerk of the county, city, or township issuing the same." . . .

"SECT. 14. Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the auditor of State for registration, and the auditor shall upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same; and shall under his seal of office certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law."

The consolidation of railroads in Kansas was authorized by a statute approved in 1870. 1 General Laws, 1872.

The township answered, —

1. That the bonds mentioned in plaintiff's petition, and to which the coupons in suit were attached, are void, because the whole issue was $75,000, and the taxable wealth of the township was: in 1871, prior to the vote on subscription, $148,686; in 1872, prior to the issue of the bonds, $181,591; and in 1873, prior to the maturity of the coupons first falling due, $159,557.

2. That said bonds were issued without any legal warrant or authority, and are absolutely void, because there was an election held Nov. 7, 1871, whereat it was voted by the qualified electors of said township that it should subscribe $75,000 to the capital stock of the State Line, Oswego, and Southern Kansas Railroad Company, and issue its bonds in payment therefor; that said company, after said election and vote

of Nov. 7, 1871, became, by and under the laws of the State of Kansas, duly consolidated with another railroad company, and that by such consolidation a new corporation was constituted and formed, called the Memphis, Carthage, and Northwestern Railroad Company; that said township, after said consolidation, subscribed $75,000 to the stock of said new corporation and issued its bonds in payment therefor, a part of which are those in said petition mentioned; that no other vote was ever taken in said township for subscribing to the stock of said new corporation or to that of any other railroad company.

The plaintiff demurred to the answer, and on the following questions the judges were opposed in opinion: —

1. Whether or not it is a defence to this action by a *bona fide* holder of the interest coupons sued on for value and without notice, that the amount of bonds, to wit, $75,000, issued by the defendant, was in excess of the amounts prescribed by the acts of the legislature of Kansas, approved Feb. 25, 1870, and approved March 2, 1872, in relation to the assessed taxable property of the defendant at the times of voting and issuing said bonds.

2. Whether or not it is a defence to this action by a *bona fide* holder for value of the interest coupons sued on without actual notice, that after the order of the board of county commissioners for an election, and after a favorable vote by a three-fifths majority of the qualified electors of Salamanca Township, according to law, to subscribe stock in the State Line, Oswego, and Southern Kansas Railroad Company, payable in negotiable bonds, to aid in the construction of its railroad, the subscription of stock and the issue of bonds without any further election were made to the Memphis, Carthage, and Northwestern Railroad Company with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line.

The demurrer was overruled, and final judgment rendered for the township. Wilson sued out this writ of error.

Mr. Joseph Shippen for the plaintiff in error.

There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The first question certified is answered in the negative upon the authority of *Marcy* v. *Township of Oswego* (92 U. S. 637), decided in this court since the trial below.

The second question is likewise answered in the negative upon the authority of *County of Scotland* v. *Thomas* (94 id. 682), also decided here since the trial below. The power of the State Line, Oswego, and Southern Kansas Railroad Company to consolidate with other companies existed when the vote for subscription was taken in the township. When the consolidation took place there was a perfected power in the township to subscribe to the stock of that company, and there was also an existing privilege in the company to receive the subscription. That privilege, as we held in the Scotland County case, passed by the consolidation to the consolidated company.

The township trustee and the township clerk who made the subscription and issued the bonds in this case were the officially constituted authorities of the township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal representatives of the township, and not as mere agents. In this particular they occupied the position of the county court in the Scotland County case. They were to all intents and purposes the township in its corporate capacity. In *Harshman* v. *Bates County* (92 id. 569), the case was different. There the county court was the mere agent of a corporation, with which it had no official connection. The difference between the two cases is precisely that between a principal and an agent, and it is so expressly said in the Scotland County case. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent.

The judgment of the Circuit Court will be reversed, and the cause remanded for such further proceedings, not inconsistent with this opinion, as may appear to be necessary; and it is

So ordered.

GRIGSBY v. PURCELL.

1. An appeal will be dismissed, where, at the term to which it was returnable, the transcript was, by reason of the laches of the appellant, not filed, or the cause docketed in this court.
2. The appellee at any time before the hearing may take advantage of the objection, or the court upon its own motion may dismiss the appeal.

MOTION to dismiss an appeal from the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

Mr. Linden Kent in support of the motion.

Mr. George Hoadly and *Mr. John W. Stevenson*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit to enforce the provisions of a trust-deed executed by J. Warren Grigsby to secure "all the debts of the house of Taylor, Shelby, & Co., created since the fourteenth day of July, 1857," for which he was liable. The bill was filed by part of the creditors for themselves and such others as should come in and prove their claims. In the progress of the cause a reference was had to a master, who in due time made his report. At the hearing before the master, the appellant, Susan P. Grigsby, the wife of J. Warren Grigsby, appeared as a creditor and proved her claim. To the report of the master she excepted; and upon the hearing the court decreed in her favor to the amount of $21,753.05, and directed the payment of that amount to her from the fund in court. The remainder of her claim was rejected. This decree was rendered at the February Term, 1875, of the Circuit Court, and on the fifteenth day of the month of February. On the 23d of the same month, and during the term, an entry was made in the cause granting an appeal prayed by J. Warren Grigsby and Susan P. Grigsby; but it does not appear that any bond for costs or for a *supersedeas* was ever executed.

On the 19th of April, 1875, Mrs. Grigsby receipted to the receiver in the cause for the amount of the decree in her favor, and on the 6th of May, still during the February Term, an

appeal prayed by W. H. Thomas was granted, but, so far as appears, no bond executed.

The October Term, 1875, of this court closed by adjournment on the 8th of May, 1876. Neither of these appeals were docketed during that term, and the transcript of the record was not filed in court. So far as appears, no attempt was made to do so, and no excuse has been given for the delay; but on the 12th of August, 1876, before the commencement of the next term, the transcript was filed by Mr. and Mrs. Grigsby, and their appeal docketed. That of Thomas was not docketed until during the present term. Nothing further was done in the case by either party until Dec. 14, 1878, when the appellees moved to dismiss the appeal of Grigsby and wife because it was a joint appeal, the appellants not being united but opposed in interest. Printed briefs for and against this motion were filed by the respective parties, and on the 23d of December the motion was overruled. The attention of the court was not called to the delay in filing the transcript and docketing the appeals until Jan. 19, 1879, when the causes were reached in their regular order on the docket. The counsel for the appellees then suggested the delay, and moved to dismiss on that account.

Sect. 997 of the Revised Statutes, which is a substantial reenactment of a similar provision in sect. 22 of the Judiciary Act of 1789 (1 Stat. 84), requires that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." Appeals are subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error. Rev. Stat., sect. 1012; 2 Stat. 244.

Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed. *Hamilton* v. *Moore*, 3 Dall. 371; *Blair* v. *Miller*, 4 Dall. 21; *Steamer Virginia* v. *West et al.*, 19 How. 182; *Castro* v. *United States*, 8 Wall. 47; *Same* v. *Gomez*, id. 752; *Mesa* v. *United States*,

2 Black, 721; *Mussina* v. *Cavazos*, 6 Wall. 355; *Edmonson* v. *Bloomshire*, 7 id. 306.

After the cases of *Hamilton* v. *Moore* and *Blair* v. *Miller*, an attempt seems to have been made in *Wood* v. *Lide* (4 Cranch, 180) to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in *Edmonson* v. *Bloomshire* we considered the practice so well established as to make it better "to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century." There are, however, exceptions to the rule, as in *United States* v. *Gomez* (*supra*), where there was fraud, and in *United States* v. *Booth* (21 How. 506), where the State court to which the writ was directed ordered the clerk to disregard the writ and make no return; but in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence.

These appellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances would be to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them.

It by no means follows, as seems to be supposed by counsel who resist this motion, that if parties appear and without objection go to a hearing in a cause docketed after the return term, our judgment will be void for want of jurisdiction. The real objection is not that this court has no jurisdiction, but that the plaintiff in error, or the appellant, as the case may be, has failed to duly prosecute his suit; and this objection may be

taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time.

Appeal dismissed.

NOTE. — In *Thomas* v. *Purcell* the appeal was dismissed, for the reasons stated in the foregoing opinion.

UNITED STATES *v.* GERMAINE.

1. Civil surgeons appointed by the Commissioner of Pensions under sect. 4777 of the Revised Statutes are not officers of the United States.
2. The Commissioner of Pensions is not the head of a department, within the meaning of sect. 2, art. 2, of the Constitution, prescribing by whom officers of the United States shall be appointed.
3. The present case distinguished from *United States* v. *Hartwell*, 6 Wall. 385.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Maine.

The facts are stated in the opinion of the court.

Mr. Assistant Attorney-General Smith for the United States.
Mr. Thomas B. Reed, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant was appointed by the Commissioner of Pensions to act as surgeon, under the act of March 3, 1873, the third section of which is thus stated in the Revised Statutes as sect. 4777: —

"That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, *which shall be paid by the agent for*

paying pensions in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe."

He was indicted in the district of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in sect. 12 of the act of 1825 (4 Stat. 118): —

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, according to the aggravation of his offence."

The indictment being remitted into the Circuit Court, the judges of that court have certified a division of opinion upon the questions whether such appointment made defendant an officer of the United States within the meaning of the above act, and whether upon demurrer to the indictment judgment should be rendered for the United States or for defendant.

The counsel for defendant insists that art. 2, sect. 2, of the Constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all* other *officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer*, though he may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class re-

quires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer *or agent* of the United States, *and all persons participating in the act*, are made liable. 9 Stat. 59.

As the defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions, by whom he was appointed, is the head of a department, within the meaning of the Constitution, as is argued by the counsel for plaintiffs.

That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the Executive, and the word as there used has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, "a part or division of the executive government, as the Department of State, or of the Treasury." Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a

department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, &c. And by one of the latest of these statutes reorganizing the Attorney-General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So in this same section of the Constitution it is said that the President may require the opinion in writing of the principal officer in each of the executive departments, relating to the duties of their respective offices.

The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.

While it has been the custom of the President to require these opinions from the Secretaries of State, the Treasury, of War, Navy, &c., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

United States v. *Hartwell* (6 Wall. 385) is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and

permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor. Let it be so certified to the Circuit Court.

JACKSON v. LUDELING.

VICKSBURG, SHREVEPORT, AND TEXAS RAILROAD COMPANY v. JACKSON.

1. In Louisiana, where a railroad, in a state of complete dilapidation and ruin, was sold under a mortgage, under circumstances which, importing some fraud in the purchasers, induced the court to set the sale aside and order a resale, such purchasers, though deemed possessors in bad faith, are entitled, by the spirit of article 508 of the Civil Code of that State, to compensation for reconstructing and repairing the road and putting it in working order.
2. Whatever question may exist about compensation for inseparable improvements made by a possessor in bad faith, there is no question about his right to be reimbursed for necessary repairs, both according to article 2314 of that code and to the general civil law.
3. It seems to be held in Louisiana, contrary to former decisions, that conpensation will not be allowed to the possessor in bad faith for inseparable improvements to land, such as clearing and ditching; but reconstructing a railroad and putting it in working order, thereby restoring it to its normal condition, partake so much of the nature of repairs, that compensation therefor is required, by an equitable construction of article 508 of the Civil Code.
4. The rule of compensation in such a case is to allow credit to the possessors for the value of the materials of such improvements as are yet in existence, and the cost of the labor bestowed thereon, not to exceed their value when delivered up; but not for the improvements which were consumed in the use. Interest on the outlay of the possessors will also be allowed to an amount not exceeding the net earnings, or fruits, received from the improvements. They will be accountable, however, for all the fruits received by them from the property, and will have a lien on it for any balance found to be due them on such an accounting. *Quære*, Are they accountable for such fruits beyond the allowance made to them for the improvements.

APPEALS from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. John A. Campbell and *Mr. H. M. Spofford* for Jackson.

Mr. Jeremiah S. Black, *Mr. Matt. H. Carpenter*, and *Mr. John T. Ludeling*, *contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case, like *Parsons* v. *Jackson* (*supra*, p. 434), arises out of the supplementary proceedings which took place in the case of *Jackson et als.* v. *The Vicksburg, Shreveport, & Texas Rail-*

road Co. (reported as *Jackson* v. *Ludeling* in 21 Wall. 616), after our decision therein. In pursuance of the mandate in that case, the Circuit Court for the District of Louisiana made a further decree on the twenty-second day of March, 1875, containing amongst other things, the following directions, that is to say:-

"2. It is further adjudged and decreed that the writ of injunction directed by the decree issue to the parties to the deed of the 5th of February, 1866, executed to John T. Ludeling and his associates, and to all of the defendants in this cause, according to the directions of said mandate, and that they be required to cancel the said deed, and deliver the same as cancelled to the master of this court hereinafter named.

"3. It is ordered that F. A. Woolfley be appointed special master to receive the said deed as cancelled; to take the proofs of the bonds *bona fide* issued, &c.; that he take an account of the property embraced in the mortgage described in the bill executed to John Ray or bearer, which was not sold or disposed of prior to 23d December, 1865, and render the account between the plaintiffs and defendants provided for in the decree aforesaid. He will give notice to the holders of bonds, &c. He will give notice to the defendants, or their solicitor, of his taking the account, and for all purposes of his duties under this order he may refer to the testimony on file in the cause, and shall also report upon the sale of the property and the best mode of effecting it, so as to promote the interests of all concerned under the decree. He is authorized to make special reports from time to time to the court, and to ask for instructions.

"4. It is further ordered that John W. Greene be appointed receiver under the decree to collect, receive, and hold possession of all of the estate, property, and effects described in the mortgage aforesaid, executed to John Ray or bearer, by the Vicksburg, Shreveport, and Texas Railroad Company, not sold or disposed of prior to the 23d of December, 1865, and to hold the same subject to the orders of this court."

To understand the questions that are raised on the present appeal, it is necessary briefly to rehearse the history of the case.

The Vicksburg, Shreveport, and Texas Railroad Company,

on the first day of September, 1857, by an authentic act of mortgage, did grant to John Ray a first-mortgage lien and privilege upon its entire railroad from the Mississippi River, opposite Vicksburg, by way of Monroe and Shreveport, to the boundary line of Louisiana and Texas, a distance of one hundred and ninety miles, more or less, including right of way, lands, property, and franchises of every description, with all its rolling-stock, machinery, and effects, including also a land-grant of over four hundred and twenty thousand acres, — to secure the payment of a contemplated issue of two thousand bonds, of $1,000 each. A considerable portion of these bonds were issued; but the disturbances arising from the late civil war resulted in the destruction of the company's property, and default in the payment of interest on the bonds. In the month of December, 1865, an order of seizure and sale was made by the Twelfth District Court of Louisiana, for the sale of the mortgaged premises, at the instance of one William R. Gordon, a holder of some of the bonds; and on the third day of February, 1866, the whole property was sold by the sheriff of the parish of Ouachita to John T. Ludeling and others, for the sum of $50,000; and a regular act of sale was passed to them on the tenth day of February, 1866; and they thereupon took possession of the property, and commenced to reconstruct the same and put it in repair. A large number of the bondholders, however, on the first day of December, 1866, filed their original bill in this case, complaining that the said proceedings were irregular and fraudulent, and praying that the said sale might be set aside, and that the property might be again sold by virtue of the mortgage for the benefit of all the *bona fide* bondholders; and that the purchasers under the first sale might be decreed to account for all moneys received, or which they might have received, from the use of the property; and for an injunction and receiver. This bill was dismissed by the Circuit Court; but that decree was reversed by this court, and a decree made in favor of the complainants, establishing the mortgage, declaring the sale to Ludeling and his associates fraudulent and void, and setting it aside, and ordering an injunction against them to refrain from setting up any title by reason thereof. The cause was thereupon remitted to the

Circuit Court with instructions to direct an account to be taken of all the property of the corporation, to appoint a receiver thereof, and to order the same to be sold for the benefit of the bondholders. It was further ordered and decreed that the defendants should account for all money and property received by them out of the property, or from its profits or income, receiving in their account such credits as, under the circumstances of the case, by the law of Louisiana, they were entitled to, and that they should pay and deliver to the receiver whatever on such accounting might be found due from them. A mandate was issued corresponding to this decree; and in obedience thereto the decree of the Circuit Court was made, which is first above recited. In pursuance of this decree an accounting was had, in which the amounts received by the defendants from the earnings of the railroad were stated and in which the defendants claimed large allowances for expenditures made by them in rebuilding and repairing the railroad and its appurtenances, and in providing it with rolling-stock, machinery, &c. The plaintiffs resisted all claim for allowances to the defendants, beyond the necessary expenses of operating the road; and whether any, and what, allowances should be made to them is the principal question in the cause. The court below made such allowances, decreeing, amongst other things, as follows: —

"*Third*, That the defendants have expended on said mortgaged property in the making of improvements and betterments thereon, which still remain upon said property ready to be turned over, the sum of four hundred and eighty-eight thousand one hundred and nine dollars and fifty-four cents ($488,109.54), on which they are entitled to interest from the date of said expenditures, at the rate of five per cent per annum, until said mortgaged property was placed in the hands of a receiver by this court; that defendants have received from the earnings of said property, over and above all sums paid out for maintenance of said property and running expenses, the sum of one hundred and sixty-one thousand four hundred and seventy-six dollars and sixty-nine cents, for which they should account, with interest at the rate of five per cent per annum from the receipt of said sum; that the interest on said sum expended

and said sum received by the defendants should be computed for the same period of time, or what is equivalent thereto, the said sum received should be deducted from the said sum expended and the interest computed on the remainder; that after making said deduction the remainder is three hundred and twenty-six thousand six hundred and thirty-two dollars and eighty-five cents ($326,632.85), which with interest added from the time when interest should be computed, up to April 18, 1875, when the receiver of this court took possession of said property, amounts to three hundred and ninety-one thousand nine hundred and fifty-nine dollars and forty-two cents ($391,959.42), for which sum defendants are entitled to compensation out of said property, to be raised in the manner hereinafter set forth.

"*Fourth*, That article 508 of the Revised Code of Louisiana, which authorizes the owner of property to require the removal or demolition of the improvements made in his land by a third person, or to keep them at the value of the materials and cost of the workmanship, is not applicable to this case, because the plaintiffs are mortgagees and not owners, and because the removal of many of said improvements is impossible, and because said improvements cannot be demolished without destroying the property of which they form a part, and therefore the claim to said election made by plaintiffs under said article of the code is disallowed.

"*Fifth*, That all of said mortgaged property, including the improvements placed thereon by the defendants, shall be set up at the price of $833,098.38, the actual value thereof, as shown in the report of the experts; and that if this sum or a greater amount be obtained at the sale the defendants shall be entitled to the sum of $391,959.40, fixed as the value of their improvements and interest thereon, as settled in the third paragraph of this decree; and if the said sum of $833,098.38 cannot be obtained, then they shall have in the same proportion of the sum actually obtained as that sum bears to the upset price aforesaid if any less amount shall be obtained.

"*Sixth*, That the holders of a majority of the bonds and coupons shall be at liberty to agree upon a committee to purchase the property for their account upon articles and terms of asso

ciations, and with concessions to any bondholder to become a party thereto at or within fifteen days from the day of sale. Should the purchase be made, the purchasers shall not be required to make a payment beyond the costs, charges, expenses of the sale, and the amount of the judgment in favor of the defendants hereinbefore stated, with five per cent interest to the day of sale, which shall be a privilege upon the proceeds of sale; and the said purchasers shall be entitled to credit their bonds with the sums that may be due from the purchasers on them as a part of the payment."

From this decree both parties have appealed; the complainants insisting —

1. That no allowance at all should have been made to the defendants for ameliorations and improvements.

2. That the allowances made are too great.

3. That interest should not have been allowed.

The defendants, on the other hand, insist —

1. That the allowances made are insufficient in amount.

2. That no allowance is made for improvements worn out in the service of the railroad.

3. That an insufficient amount of interest is allowed.

4. That no allowance is made for salaries and contingent expenses, taxes, &c.

5. That it does not enforce the right of the defendants to retain possession until their claim for improvements is paid.

6. That the account of earnings is incorrectly stated.

Other errors are assigned, but they are either included in those stated, or are not of sufficient importance to require serious consideration.

Assuming that the determinations of this court in its former decree are not open to further question, and that the defendants acquired possession of the property by a proceeding which was founded in fraud, still it cannot be doubted that they supposed themselves to be the legal owners of the property by virtue of the judicial sale, and made the repairs and improvements in controversy under that idea. But as the vice of their title consisted in their own inequitable acts and proceedings, we think that they are to be regarded, in the language of the civil law, as possessors in bad faith. The common law allows

nothing to the possessor in good or bad faith for expenditures made upon land from which he is evicted by superior title; but equity, in cases within its jurisdiction, allows the possessor in good faith both for repairs and improvements; but where the possessor (being a trustee) has been guilty of actual fraud, it makes him no allowance for improvements, but allows him compensation for necessary repairs. Lewin, Trusts, 466. The present case, however, is to be governed by the law of Louisiana, which is based upon the civil law, not precisely as laid down in the compilations of Justinian, but as interpreted in the jurisprudence of France and Spain; and has some peculiar rules on this subject. When Louisiana was acquired by the United States in 1803, it had been a colony of Spain for more than thirty years, except in the formal transfer to France at the time of our purchase; and the Spanish law was the common law of the Territory until modified by subsequent legislation. In 1808, the first civil code was adopted, based partly on the Spanish Partidas and partly on the *projet* of the Code Napoleon, the completed code not having yet been received. In 1825, the Civil Code was revised, and was made to conform more closely to the French code, often copying its phraseology. The provisions of the code which have the nearest application to the present case are the same both in the code of 1808 and 1825, and are very nearly an exact copy of the corresponding provisions of the Code Napoleon, whilst they also correspond, substantially, with the Spanish law. They are as follows: —

"ART. 508. When plantations, constructions, and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this person to take away or demolish the same.

"If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.

"If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

"Nevertheless, if the plantations, edifices, or works have been

done by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, plantations, or edifices, but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."

"ART. 2314. He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property."

These articles are substantially equivalent to articles 555 and 1381 of the Code Napoleon. They are also nearly equivalent to the laws of the Partidas. The latter divide ameliorations into three kinds, — necessary, useful, and voluntary: *Necessary*, such as preserve the property and prevent it from going to ruin, as repairs to a house, causeways to prevent inundations, &c.; *Useful*, such as augment the value of the property and its rents, as the planting of trees or vines, the erection of a furnace, wine-press, barn, or stable; *Voluntary*, such as are made for ornament or pleasure. The Partidas declare that if the possessor in bad faith makes necessary repairs, or does other things by which the estate is benefited, he may recover the expense thereof, less the amount of rents received, and will not be obliged to deliver the property to the owner until such compensation is made. But if he construct an edifice, or plant seed, he can only deduct the expense from the fruits for which he is made accountable; or if he has defrayed expenses for works of profit and utility, and the owner is unwilling to reimburse him, he may carry away the additional works which he has erected. Partida III. title 28, laws 42, 44; Escriche, titles *Mejores* and *Poseedor de mala fe*.

From these laws it seems clear that for necessary repairs the possessor, even in bad faith, is entitled to full indemnity; and for useful improvements, he will also be entitled to full indemnity to the value of the materials and price of workmanship, if the owner elects to retain them; or the right to demolish them and remove the materials, if the owner shall elect not to retain them. The general principle upon which this law is founded is that no one should be made richer at the expense of another, even though the latter has acted in bad faith.

The question then arises how the laws which we have quoted are to be applied in a case like the present, — the case of a railroad which was in a state of ruin and dilapidation, and which the purchasers have repaired and put in working order. Are they to be indemnified in any way, or to any extent, for the expense which they have been at, or are they to lose it all?

We have no great difficulty in considering the parties as holding the relation of rightful owners on one side, and ejected possessors on the other. Both claim under the same title, — the mortgage; and the question between them was, whether the derivative title of the defendants was a valid one or not. The complainants, if not the owners, represent the owners, namely, the railroad company, which is conceded to be utterly insolvent and practically out of existence. So far as the parties are concerned, therefore, the laws above quoted may be regarded as applicable to them.

But, in regard to the subject-matter, it seems almost impossible to apply them literally. It is not like the case of lands, either in the country or the town. These may be recovered and enjoyed by the owner, though the improvements erected thereon be demolished. But a railroad is not land: it is a peculiar species of property, of a compound character, consisting of roadway, embankment, superstructure, and equipment. These constitute the *corpus* of the property. There is no room to exercise the election which the law gives to the owner, of keeping the ameliorations, or requiring the ejected possessor to demolish them. The demolition of the ameliorations would be the demolition of the thing itself. If any room for election does exist, it is virtually made in bringing the suit to recover the property. To carry out the spirit of the law, therefore, since we cannot carry out its letter, the other alternative, of allowing the defendants compensation for their ameliorations, seems to be the only course that is left. Its propriety in this case is corroborated by the fact that the property in its improved state has been taken possession of by a receiver at the instance of the complainants, and has been used for their benefit for now nearly four years past.

In addition to these considerations, it is very questionable whether a large portion of what are called ameliorations in

this case are not rather to be regarded as repairs. The railroad has been rescued from destruction and repaired by the defendants. These repairs were necessary in order to restore the property to its condition and quality as a railroad, — the thing which the mortgage contemplated, and which the complainants seek to possess under and by virtue of the mortgage. So far as the improvements may be regarded as necessary repairs, there is no question that the defendants would be entitled to compensation for their expenses in making the same. But as it is impossible to distinguish what might properly be called repairs from ameliorations, we think that the rule laid down in the law for the case where the owner elects to keep the constructions and works erected by the unlawful possessor may be equitably applied. This rule is that the latter shall be reimbursed the value of his materials and the price of the workmanship. This was the rule adopted by the Circuit Court, and we think that its decision in this respect was correct, except that, in an equitable application of the rule, the allowance made to the defendants should not exceed the value of the improvements. For this amount, therefore, with interest, less the fruits received, the defendants should have remuneration.

After a careful examination of the authorities bearing upon the case, we find nothing which, properly considered, derogates from this view of the case. The class of cases which comes nearest to the present is that of lands which have been cleared up, and brought to a state of cultivation by embankments and ditches: though even here, there is a point of difference which it is material to notice; namely, that such clearings and reclamations of new land involve a change in its character, which was not produced by the rehabilitation of the railroad. The repairs made on the latter had the effect to restore the property to its first estate and use; and the expenditures for that purpose are such as the true owner must necessarily have made, in order to have the property in the only form which its nature and uses admit of, and which the mortgage contemplated.

A leading case in Louisiana relating to clearing and reclaiming land is *Pearce* v. *Frantum*, decided in 1840, and reported in 16 La. Ann. 414. In that case, the defendant

had settled on the land, supposing it to belong to the United States, and that he had a right of pre-emption to it; but it turned out to be an Indian claim under which the plaintiff's title was derived. Whether the defendant was a possessor in good or bad faith the court do not seem to have decided, and do not appear to have regarded it as material. The defendant cleared about one hundred and fifty acres of the land, and put up a very ordinary dwelling on it, and some cabins. The clearing was the principal improvement; and with regard to the defendant's claim to compensation therefor, the court said: "The right of the defendant to be paid for the improvements by which the value of the premises was enhanced depends upon other provisions of law. It rests upon the broad principle of equity, that no man ought to enrich himself at the expense of another. If instead of recovering four hundred arpents of waste land, covered with heavy timber, the plaintiffs succeeded in establishing their title to that quantity, of which one hundred and fifty is ready for the plough, together with the convenience of a dwelling and a gin, the result of the industry of his adversary, he cannot justly resist the latter's claim for remuneration. If the party evicted be entitled to be paid for edifices erected on the premises, of which the successful party has taken possession, no plausible reason can be perceived why he should lose the lasting conquest his industry has achieved over the forest."

On a reargument of the case, the court, in support of the same views, further said: "The character of Frantum's possession, his liability to restore fruits upon eviction, and his right to be paid for useful improvements, are to be determined by the provisions of the code of 1808, and the Spanish law then in force. Admitting that the provisions of the code itself left it doubtful whether Frantum was or was not a possessor in bad faith, in that sense which would deprive him of a right to claim for improvements, yet, the forty-fourth law, twenty-eighth title, of the third Partida, appears fully to sustain the court in the position first assumed; to wit, that 'in respect to the right to be reimbursed for useful expenses, by which the property has been made more valuable to the owner, the code makes little or no distinction between the possessor in good

or bad faith.' The words of that law of the Partida are: 'Men may incur expenses on account of other persons' houses or lands, not by erecting new works there, but by making necessary repairs, or doing other things there by which the estate is benefited. In that case, we say that if such expenses were necessary, they who made them may and ought to recover them back, while in possession of the estate upon which they expended them, whether they hold in good or in bad faith; and, though the owner may evict them by a judgment of the court, they will not be obliged to deliver him the house or estate until he shall have paid the expenses incurred on account of the same.'"

The court also cites Merlin, as follows: "Merlin, after treating this subject *ex professo*, and in a manner as usual with that author, which leaves little to be said on either side, and after discussing the opinions of Cujas, Favre, and other distinguished doctors, opinions not always in harmony with each other, sums up his conclusions in the following manner. . . . We may, therefore, lay it down as a settled rule, that the proprietor who sues for an immovable (*un fonds*) never ought to enrich himself at the expense of the possessor, whether in good or in bad faith, no matter in what manner the maxim ought to be applied." Repertoire de Jurisprudence, verbo Amelioration, 16 La. 431.

Quite a number of cases, which it is not necessary to quote, followed the general reasoning of this case. In *Beard* v. *Morancy* (2 La. Ann. 347), decided in 1847, the court allowed a party compensation for improvements of the same kind as those in *Pearce* v. *Frantum*, made after judicial demand, and after judgment of eviction; holding that they were necessary improvements, and that the rule of compensation should extend to such, though not to improvements merely useful. The court say: "But there can be no doubt that the party evicted is entitled to be paid for necessary improvements. The improvements in this case were clearings, levees, and ditches without which the land could not have been brought into cultivation, so as to yield the rents and profits which the plaintiff now claims."

If the Supreme Court of Louisiana was correct in this case

in holding that the ameliorations made by the defendants were necessary improvements, taking into view the fact that the character of the property was changed thereby from its original condition, then, much more in the present case ought the improvements effected by the defendants to be regarded as necessary, resulting as they did in the restoration of the property to its original and normal state. It is for the use by the defendants of these very improvements that the complainants are seeking, in this suit, for an account of fruits and profits of the estate.

There is a series of cases, however, in which it is held by the Supreme Court of Louisiana that a person without title, going into possession of the public lands of the United States, cannot set up a claim for improvements against the government or its grantees. This was decided in *Jenkins* v. *Gibson*, 3 La. Ann. 203; in *Hollon* v. *Sapp*, 4 id. 519; and in *Jones* v. *Wheelis*, 4 id. 541. In *Hollon* v. *Sapp*, the court say expressly, "We are of opinion that this article of the code is not applicable to materials used and labor expended in making settlements upon the national domain. No right can be acquired in relation to the public lands except under authority of Congress."

The case of *Gibson* v. *Hutchins* (12 id. 545) is much relied on by the complainants, and in its general reasoning does undoubtedly overrule the doctrine of *Pearce* v. *Frantum*, though, as in *Jenkins* v. *Gibson*, *Hollon* v. *Sapp*, and *Jones* v. *Wheelis*, the title of the land was in the government when the improvements were made. The court say: "The mere possessor is presumed to have made such changes for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil. Perhaps the true owner would have preferred that the primitive forest should remain. Perhaps the ditching will not suit the purposes for which he wishes to use the land." It is evident from the reasons here given that the court regarded the change of the condition and character of the land as a material circumstance, and the suggestion is not without force, that the owner might have preferred that the original timber of the forest should not have been destroyed. The present case, as already intimated, is distinguishable from *Gibson* v. *Hutchins*, and others

of like character, in that the character of the property is not changed by the improvements, but the property is restored to its original condition, purpose, and use, and to the only condition and use which it is susceptible of, and which makes it what it is, — a railroad. It is this aspect of the present case which gives to a large portion of the improvements made the character of necessary repairs.

But the fact that the title to the land in the case of *Gibson* v. *Hutchins* was in the government when the improvements were made is sufficient, of itself, to place it in a different category from the present. The court, indeed, say: "He" (the defendant) "had no claim against the United States for improvements. He was rather indebted to the United States for the privilege of living so long undisturbed upon the public land. And the United States ceded its rights to the plaintiff's authors. They took it free from any legal demand against either the government or themselves for improvements." 12 La. Ann. 547. Reference is then made by the court to *Pearce* v. *Frantum*, and other cases, as being overruled. But one of the grounds for overruling them is stated to be that they sustained a claim for improvements against the United States. "The overruled cases," said the court, "conceded to a settler upon the United States lands, who possessed with the hope of securing a pre-emption, the right of retaining the land against a vendee or patentee of the United States government until such patentee should reimburse the settler the increased value of the property as resulting from improvements and expenses upon it during the settlement." It is true, the court adds, "we said in *Hemkin* v. *Overly*" (a case which seems not to have been reported) "that 'we are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title has any legal or equitable claim to reimbursement for such improvements.'" But with the feature referred to, — namely, the right of the government, present in the case of *Gibson* v. *Hutchins*, to which so much importance is given, — it is impossible to regard it as a decisive authority on the general question of a possessor's right to compensation for improvements which are inseparable from the land.

It must be conceded, however, that in several subsequent cases the Supreme Court of Louisiana has used expressions indicating an intention to adhere to the general views enunciated in *Gibson* v. *Hutchins*, and to hold that for improvements of the kind referred to the only compensation which the maker of such improvements can claim is the benefits which he has enjoyed from the use of them. Thus, in *Cannon* v. *White* (16 La. Ann. 91), the defendant having been adjudged a possessor in bad faith, the court held that he was entitled to no other claim for improvements than those stated in the first three sections of the article of the Civil Code before recited. Art. 508. The improvements consisted of a clearing of two hundred and thirty acres of land, and of certain erections on the land, costing $5,250. The clearing was set off in compensation of the fruits and cord-wood derived from the land cleared, which, the court said, would more than compensate for the clearing made. As to the erections, the plaintiff was decreed to elect in thirty days whether he would keep them and pay for their cost, or not; if he so elected, or made default, it was decreed that he should pay for them; on his refusal to retain them, the defendant was allowed to remove them in a reasonable time.

But in the case of *Stanbrough* v. *Wilson* (13 id. 494), decided a year later than *Gibson* v. *Hutchins*, the defendant, who had purchased land at a probate sale, which was declared void, and which would probably place him in the category of a possessor in bad faith, was allowed compensation for his improvements, including over $4,000 for clearing the land, and judgment was given in his favor for a balance exceeding $5,000, over the rent of the property.

And in the case of *D'Armand* v. *Pullin* (16 id. 243), where the defendant had erected various improvements on land to which he had no just title, the court held that, under the code, the plaintiff had the right either to keep them, or to cause their removal or demolition; but also held, that by executing a lease to the defendant for a few months, after having procured an adjudication of his title, he had elected to keep the improvements, and must pay the defendant their cost.

The case of *Wilson* v. *Benjamin et al.* (26 id. 587) was decided at the same term with *D'Armand* v. *Pullin* (1861), and

the judgment was affirmed on a rehearing in 1874. In that case, the plaintiff, who had been a possessor in bad faith, sued for the value of his improvements; and it was held that his expenses in clearing the land should be set off in compensation for his detention thereof; and judgment was given in his favor for the value of his other improvements, consisting of erections on the land; and the court refused to charge him any rent therefor, because they were his own property.

On the whole, we should infer the prevailing doctrine of the Supreme Court of Louisiana at present to be, that for inseparable improvements on land, such as clearings, &c., made by a possessor in bad faith, he cannot recover any compensation from the owner; though he will not be accountable for the fruits derived from such improvements.

But, as before suggested, we do not think that the decisions referred to govern the present case. It is so different in its circumstances from the cases in which those decisions were made, that any attempt to carry out the spirit of the code will require that those circumstances should be taken into consideration.

The character of the property, — a railroad, — so different from that of land; the character of the ameliorations made to it, partaking so nearly of that of necessary repairs; the acts and demands of the parties in this suit, wherein the plaintiffs seek possession of the ameliorations in question, and thereby in effect elect to retain them, and seek to charge the defendants for all the fruits and profits thereof; the fact that, at the instance of the complainants, and for their benefit, the property, with all its ameliorations, has been taken out of the defendants' hands, and placed in the hands of a receiver; the fact that the plaintiffs, in getting possession of the property, cannot but come into the enjoyment of large expenditures which the defendants have made, and which, if they had not made, the plaintiffs, or the persons who may purchase the property, would have to make, and which they are now relieved from making; the fact, in other words, that the taking of the property in its present state would make the complainants so much richer as the improvements are worth, — all these things combined present a case so peculiar, that we do not see how it is possible for the

complainants, under any fair interpretation of the code, to avoid allowing the defendants the value of the improvements. On the contrary, we think that the code, interpreted according to its spirit and meaning, requires that the complainants should take the property, or rather that it should be sold, subject to the lien of the defendants for the actual expense which they have incurred in creating and putting into repair the works as they now exist, but not to exceed the actual value thereof.

We have not thought it necessary to discuss or review the commentaries on the French code cited by both parties, except in a single instance, which will be presently stated. We have examined them sufficiently to ascertain that they give us no clear light on the precise question in this case. They are not consentaneous even on the general question of inseparable improvements made to land. The references to the Roman law, even if otherwise applicable to the case, cannot be received against the positive laws of France and Spain, much less against the text of the Civil Code of Louisiana. It is this code, and the proper meaning and effect to be given to its provisions, adopting its spirit where the letter is imperfect, that must decide the case before us. It is conceded by many French jurisconsults that the Roman law of Justinian refuses any reimbursement for improvements to a possessor in bad faith. But the French law has always been otherwise. See Denisart, *verbo* Ameliorations, vol. i. p. 495, where this subject is discussed.

Cujas thought the rule for reimbursement could be deduced from the general principle that no one ought to enrich himself by another's loss; and from the dispositions of the thirty-eighth law of the title De Petitione Hereditatis. Dig., lib. v. tit. iii. Pothier, expounding the old French law, says: "In our practice, it is left to the discretion of the judge to decide, according to the different circumstances, whether or not the owner ought to reimburse the possessor in bad faith for useful expenses to the amount that the property recovered is benefited thereby." And then he distinguishes between possessors in bad faith whose acts partake of a criminal character (such as usurping an estate without any title during the long absence of the owner), and those who have taken a title

which they knew was not valid, yet had some excuse for doing so (such as purchasing from a guardian, &c.). The former class should receive the utmost rigor of the law; the latter should be treated with indulgence, and should receive compensation for their ameliorations to the amount they have benefited the property. Pothier, Traité du Droit de Propriété, sect. 350.

The Code Napoleon settled many uncertainties of the old law, and attempted to lay down a fixed rule; but, nevertheless, as we have seen, left the question of inseparable improvements somewhat at large.

Demolombe, one of the ablest commentators on this code, in vol. ix. sect. 689, has a very interesting article on this subject. He thinks that inseparable improvements are not provided for by article 555 of the code; but that the question of compensation therefor is to be governed by general principles of equity, to be drawn from other sources. He instances the case of a possessor in bad faith who has drained a marsh, cleared lands, dug ditches for irrigation, or who has caused paintings to be made or paper to be placed on the walls of a mansion, or who has performed any other like work of intrinsic amelioration. And he asks, Is article 555 applicable in such a case? After stating the argument on both sides of this question, he gives his own opinion in the negative. He says the article refers to works which the possessor may be compelled to remove; but such as those mentioned are not susceptible of removal; and the option given to the owner, either to keep them by payment, or to cause them to be removed, cannot be exercised. Besides, it would be a savage doctrine to hold that the possessor might in any case destroy such improvements, even though he should leave the property in its first estate. He therefore concludes that the specific case is unprovided for, and thinks that it is necessary to resort to analogies deduced from similar matters and to the general principles of the law; and that a solution of the case may be found in the *quasi* contract of agency. We find here, he says, two rules of equity, both equally certain: —

First, That no one ought to enrich himself at the expense of another, — a rule which the law applies in the very case of

the relations between the owner and possessor, even in bad faith.

Second, That a third person cannot impose upon the owner of the soil, without his authority and against his will, expenses which he would not have made himself, and which exceed his means, and for the payment of which, if forced to it, he would have to sell an estate that he would prefer to keep.

In the combination and conciliation of these two rules, he thinks, we may find the solution of the difficulty.

He then quotes to his purpose a law of the Digest (law 38, De Rei Vindicatione, book vi. tit. i.), which he characterizes as full of good sense, equity, wisdom, and practical knowledge of affairs. It is a passage from Celsus, as follows: "On another's land which you have unwittingly bought, you have builded, or made repairs; then you are evicted; a good judge will decide according to *the merits of the parties, and according to the circumstances*. Suppose the owner would have done the same thing, then let him reimburse the expense, as a condition of receiving his land; but only to the amount that it is benefited. If he is poor, and cannot pay without selling his home, you should be satisfied in being permitted to remove what you can of your improvements, leaving the estate in as good condition as if they had not been made. But it has been decided that if the owner can pay what the possessor can get for them, if removed, he should have that privilege. And let nothing be done in malice; as, by defacing plaster or pictures on the walls, which could do you no good, but only result in injury. If it is the owner's intention immediately to sell the property, you will not be condemned to give it up, until he has paid what we have said he ought to pay."

Considering the possessor in bad faith as a *quasi* agent in charge, and applying these principles, we must look, says Demolombe, —

First, To the *character of the possessor:* as whether he has taken a title which he knew to be invalid, but which he hoped to have confirmed; or whether he was a mere interloper, without title, taking possession in the absence of the owner.

Second, To the *character of the owner:* as whether he would himself have been able and willing to make the improvements

in question; whether they would be useful to him, considering his profession, habits, &c.; and whether it was his intention to keep the property, or to offer it for sale.

Third, To the *nature of the improvements made:* as whether they have added to the income and to the actual value and salableness of the property, &c., or only to its ornamentation, &c.; also, whether the improvements have or have not been excessive and unreasonable.

The consideration of these three elements, giving due weight to each, will enable the judge to decide whether any indemnity should be given; what it should be; and how it should be paid, whether at once or on time, whether in a capital sum or in the way of rent.

This is the substance of Demolombe's article. We can only say, that if it is a sound explication of the law of France, and, therefore, of the law of Louisiana (which in this matter is exactly the same as that of France), it is in direct accord with the result to which we have been brought in this case, by the application of the principles which we suppose to be involved in article 508 of the Civil Code of Louisiana, interpreted according to its spirit and intent. If by the course of decisions in Louisiana it cannot be held to apply to the case of an ordinary immovable, it is at least applicable to such a case as that with which we are now dealing, considered in all its various circumstances.

The other points raised in the case do not present much difficulty. We shall proceed to consider those which we deem material.

First, The defendants complain that they were not allowed for the cost of those things which were consumed by them in the use, such as cross-ties, &c., which were worn out, and had to be replaced. The court below only allowed them compensation for those things which were in existence when the railroad was turned over to the receiver, in April, 1875. This, it seems to us, is in strict accordance with the law. In ordinary cases of possessors in bad faith, the owner, according to article 508, has an election either to keep the constructions and works, or to require their removal. He certainly cannot keep, nor require the removal of, that which no longer exists

When he elects to keep them, as we suppose to be virtually the case here, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship. This evidently refers only to the materials which compose the things which are in existence at the time of making the election, — and that time, in this case, must be deemed to be the time of the delivery of the property to the receiver, which was on the 13th of April, 1875. We think the court was right in deciding that it was the improvements then in existence, the value or cost of which was to be allowed to the defendants.

Secondly, The defendants complain that the full first cost of the improvements which were in existence was not credited to them in the decree: they contend that these improvements cost them at least forty per cent more than their value at the time they were appraised by the experts, besides the sum of $49,005, which the experts deducted for deterioration.

The experts appraised these improvements in the fall of 1875, and estimated their then cash value at the sum of $347,361.29. It was sufficiently shown that their original cost was considerably more than this. The master, from the evidence before him, estimated and reported that the cost of materials and workmanship was, on the whole, twenty-five per cent more than their then value, the cost being much greater when the improvements were made than the same would be at the time of the appraisement, in consequence of the condition of the country after the war, the disturbance in labor, and the expansion of the currency. He therefore reported the cost at $434,201.61. But as the experts had deducted $49,005 for deterioration of iron rails whilst used by defendants, this sum added would make the whole first cost $483,206.61. The court, in its opinion, considers the allowance of twenty-five per cent as excessive, because, whilst prices were higher when the improvements were made, so also the currency was depreciated; and the court was of opinion that fifteen per cent additional was sufficient. This would make the first cost of the improvements equal to $399,465.48. But the decree allows the sum of $488,109.54, which is more than forty per cent greater than the amount of the appraisement. No explanation of this discrepancy has been

made. It seems to be the result of some inadvertent error in making the computations.

But, in our judgment, there should be no allowance for increased cost. We have proceeded on the principle of carrying out the spirit and equity of the law, since it cannot be carried out in the letter. Now, the letter gives the owner the option of requiring the improvements to be removed. This option is a means in his hands of protecting himself if the original cost is greater than the improvements are worth. As he cannot actually exercise it in this case, it would violate the spirit of the law to allow the defendants a greater sum. We think, therefore, that the appraised value of $347,361.61 is all that can be allowed to the defendants.

Thirdly, As to the question of interest. On this subject there does not seem to have been any distinct adjudication by the Supreme Court of Louisiana. In all the cases which we have examined, the rents, or fruits, have been deducted from the cost of the improvements, or *vice versa*, and judgment given for the balance, without any calculation of interest on either side, except where the possessor, in exoneration of the estate, has paid money which was a lien thereon. The question of interest does not seem to have been debated. But the French jurisconsults, who have given special attention to this subject, agree that when the owner of the land compels the unlawful possessor to account for the fruits of his improvements, the latter is entitled to interest on their value, — on the principle that it would be unjust to charge him for the fruits of his own improvements without allowing him interest on their cost, provided it does not exceed the amount of such fruits, — not, indeed, as interest properly so called, but as an equivalent *pro tanto* to the fruits received, in the account to be rendered thereof. They all agree, however, in saying that interest cannot be allowed beyond the amount of such fruits, and that it cannot be brought into compensation with the fruits of the original property. Demolombe on the Code Napoleon, vol. ix. art. 679; Aubry & Rau, Droit Civ. Fr., vol. ii. sect. 204 *b*, p. 232 and note; Dalloz, vol. xxxviii. p. 273, tit. Propriété, art. 429.

In the present case, the fruits were, in fact, the results of

the improvements made. The property, when taken possession of by the defendants, was a ruin. They reconstructed it, and made it capable of producing what it did produce. According to the French rule, therefore, the defendants were entitled to interest on their expenditures in making the improvements in question, provided it did not exceed the fruits and profits with which they were charged. It is conceded that interest should only be charged at the rate of five per cent per annum. The master estimates four and a half years as the proper average time for allowing interest. In this we concur. The interest, therefore, on the whole first cost of the improvements, without deducting for deterioration, would be $108,721.48. This should be credited against the net earnings for which the defendants are held responsible, both being in the same currency. These net earnings were found to be $161,476.69; and deducting the said interest therefrom, the remainder is $52,755.21, which is to be deducted from the value of the improvements. Being so deducted, the balance is $294,606.08.

This sum, according to our view, was the amount due to the defendants at the time when they delivered the property to the receiver, and not the sum of $391,959.42, as stated in the decree of the Circuit Court; which should, therefore, be reversed, with directions to be corrected in respect to the amount, as now stated; which amount, with interest at the rate of five per cent per annum from the time of delivering the property to the receiver, should be first paid to the defendants out of the proceeds of the sale of the property, before any payment made to the bondholders. But as it may be difficult for the bondholders, or other persons purchasing the property, to raise at once the whole amount due to the defendants, the court below should direct the property to be sold subject to the lien of the defendants for said amount with interest as aforesaid, and should allow a reasonable time to the purchaser, not exceeding nine months from the day of sale, to pay the same; with a condition annexed to said sale, that if the amount due the defendants be not paid within the time so limited, a resale of the property shall be made for the purpose of satisfying said amount due the defendants, with interest as aforesaid and expenses. The court should also direct that, subject to said

lien, no bid be received for a less sum than will be sufficient as a fund to defray the costs, expenses, and charges arising in the cause since the former decree of this court; which costs, expenses, and charges, except the costs of the defendants for attorneys', counsel, and witness fees, should be paid from said fund. The amount of said fund should be fixed by the court, and should be paid to the special master making said sale before adjudicating the property as sold to any bidder.

In view of the dispositions thus to be made in the decree, the defendants will not be concerned or interested in the accounts and transactions of the receiver; but any net earnings of the railroad, or proceeds of property, which shall have come into his hands as such receiver, after paying his expenses and compensation, will go to the benefit of the bondholders; and any deficiency of moneys in his hands to pay said expenses and compensation should be paid out of the said fund required to be paid in cash as aforesaid.

As to the costs in the court below, incurred since the former decree of this court, the defendants should be decreed to pay their own attorneys', counsel, and witness fees; and the residue of the costs, expenses, and charges in the cause should be paid out of the proceeds of said sale from the fund before specified in that behalf.

We do not deem it necessary to discuss the remaining points which have been raised on either side. We have given them due attention, and do not regard them as presenting any valid objection to the residue of the decree.

The decree of the Circuit Court will be reversed, and the record remitted with directions to enter a decree in conformity with this opinion, each party to pay their own costs of this appeal; and it is

So ordered.

MR. JUSTICE FIELD dissenting.

I agree with the court that the decree should be reversed, but I do not agree with it in allowing the defendants compensation for expenditures and improvements upon the road whilst they were in control of it. This court has held, after elaborate consideration, that they were possessors in bad faith,

having obtained control of the road fraudulently. I know of no law and no principle of justice which would allow them any thing for expenditures upon property they wrongfully obtained and wrongfully withheld from the owners, who were constantly calling for its restitution. Why should the owners pay for ex penditures they never ordered, or for the construction of works they never authorized? The defendants knew all the time the vice of their title; they knew they were not possessors in good faith; they concocted the scheme by which the fraudulent sale was made; and this court has so adjudged.

In the courts that administer the common law the rights of the owner are paramount and exclusive. An occupant without title is not recognized as entitled to compensation for improvements. Heron, in his History of Jurisprudence, says: There is no case "decided in England, Ireland, or the United States, grounded upon common-law principles, declaring that an occupant of land, without a special contract, is entitled to payment for his improvements as against the true owners, when the latter had not been guilty of a fraud in concealing the title." p. 715.

And courts of chancery do not give to an occupant compensation for improvements, unless there are circumstances attending his possession which affect the conscience of the owner, and impose an obligation upon him to pay for them or to allow for their value against a demand for the use of the property. *Putnam* v. *Ritchie*, 6 Paige (N. Y.), 390; Story, Eq. Jur., sect. 799; *Mill* v. *Hill*, 3 H. L. Cas. 828; *Gibson* v. *D'Este*, 2 Y. & C. 542; *Mulhallen* v. *Marum*, 3 Dru. & W. 317. To a possessor whose title originates in fraud, or is attended with circumstances of circumvention and deception, no compensation for improvements is ever allowed. *Railroad Company* v. *Soutter et al.*, 13 Wall. 517; *Morrison* v. *Robinson*, 31 Pa. 456; *Van Horne* v. *Fonda*, 5 Johns. (N. Y.) Ch. 388, 416; *Russell* v. *Blake*, 2 Pick. (Mass.) 505; *McKim* v. *Moody*, 1 Rand. (Va.) 58; *Morris and Others* v. *Terrell*, 2 id. 6.

The learned counsel for the appellants who argued this case showed, I think, conclusively, by reference to numerous adjudications and approved text-writers, that the civil law as enforced in Europe and in Louisiana draws the same line of

demarcation between the possessor in good faith and the possessor in bad faith in allowing for improvements and expenditures on the property of another. Pothier, the great legal writer, referring to the rule that no man ought to enrich himself at the expense of another, upon which compensation for improvements is here claimed, says: "A *bona fide* possessor may properly oppose it against an owner, but it is not available to a *mala fide* possessor. The owner can reply to the latter that equity did not empower him to take possession of his land and to make thereon such changes as he desired and so put the owner to charges that were burdensome, and that he might not wish to bear, and which this possessor had no right to impose. If the latter suffers from the failure to reimburse him, he must blame himself, as being in fault, and no one can complain of consequences he has brought upon himself." Traité du Droit de Propriété, sect. 350.

The civil law as thus stated corresponds with what a great chancellor of England said of the interference of equity to allow one the value of improvements on another's property. "If a person," he said, "really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditures, without apprising the party of his intention to dispute his title, and will afterwards endeavor to avail himself of such fraud, the jurisdiction of equity will attach in such a case. *But does it follow from thence that if a man has acquired an estate by a rank and abominable fraud, and shall afterwards expend his money in improving the estate*, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule shall prevail, it will certainly justify a proposition which I once heard stated at the bar of the Court of Chancery, that a common equity of this country was to improve a man out of his estate."

I prefer in this case to stand by the ancient law, than to follow any new doctrines supposed to arise out of the character of railroad property. To me it seems that the peculiar character of that property requires the special application of the old law; for just in proportion to the value of this property is the temptation to get possession of it, and if plunderers can, when

compelled to restore it, be allowed for their expenditures and alleged improvements, there will be an added incentive to plunder.

I therefore dissent from so much of the decree of this court as allows for expenditures upon property the possession of which the defendants did not obtain in good faith.

YULEE *v.* VOSE.

A., a citizen of Florida, with other persons, some of whom were citizens of New York, was sued by a citizen of the latter State, in a court thereof. The plaintiff, in his petition, alleged that the defendants held all the franchises and property of a certain railroad company, and prayed that they be required to hold the income of the railroad in trust for the payment of a judgment theretofore rendered in his favor in that court against the company, and that they be directed to pay him the amount thereof, and for other relief. He averred that A. was indorser on part of the notes on which the judgment had been rendered. There was a judgment in favor of all the defendants, which the Court of Appeals affirmed, except as to A. The cause was remanded for a new trial as to him, solely on account of his alleged liability as such indorser. After the *remittitur* went down to the court of original jurisdiction, and before such new trial, A. filed his petition in due form, accompanied by the necessary bond for the removal of the suit as against him to the proper Circuit Court of the United States, under the act of July 27, 1866, 14 Stat. 306. *Held*, that the matter in dispute being sufficient, A. was entitled to a removal of the suit.

ERROR to the Court of Appeals of the State of New York.

This was a suit commenced Feb. 16, 1868, in the Supreme Court of New York, by Francis Vose against the Florida Railroad Company, David L. Yulee, Edward N. Dickerson, Marshall O. Roberts, and Isaac K. Roberts. The prayer of the complaint was that Edward N. Dickerson, Marshall O. Roberts, and all other associates of Edward N. Dickerson, who, when discovered, should be made parties, might be required to pay a judgment which had been rendered in favor of Vose against the Florida Railroad Company in the Supreme Court of New York, on which there was due $136,534.63, and interest from Feb. 1, 1867; that Dickerson, Yulee, Marshall O. and Isaac K. Roberts, and their associates, who it was alleged held all the franchises

and property of the company, might be required to hold the income of the railroad, in trust for the payment of the amount of the judgment; that certain securities alleged to be in the hands of Yulee might be also subjected to the payment of the debt; and for other relief. It further appeared from the averments in the complaint that Yulee was liable as indorser on part of the notes on which the judgment was rendered; and this allegation was not denied in his answer, but no judgment was specifically asked against him on that account.

On the trial of the cause, the complaint was dismissed as to all the defendants. This judgment was affirmed in all respects by the Supreme Court in general term; but in the Court of Appeals it was reversed as to Yulee, and the cause remanded for a new trial as to him, on account of his liability as indorser of the notes. As to all the other defendants and all other relief asked there was an affirmance.

On the 5th of June, 1873, after the mandate went down from the Court of Appeals, Yulee filed in the trial court his petition, accompanied by the necessary bond, for the removal of the suit as against him to the Circuit Court of the United States for the Southern District of New York, under the act of July 27, 1866, 14 Stat. 306. That statute provides that if in any suit already commenced, or which might thereafter be commenced, in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, a citizen of the State in which the suit is brought is or shall be a defendant; and if the suit, so far as it relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is one in which there can be a final determination of the controversy so far as it concerns him, without the presence of the other defendants as parties, "then and in every such case the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pend ing, . . . and it shall thereupon be the duty of the State court . . . to proceed no further in the cause as against the defendant

so applying for its removal." The petition for removal set forth, in sufficient form and with sufficient particularity, the citizenship of Vose in New York, and of Yulee in Florida, both then and at the time of the commencement of the suit; but it made no mention of the citizenship of the other defendants. In all other respects the petition met fully the requirements of the statute. The accompanying bond was also correct in form, and no objection was made to its sufficiency. Notice of an intention to make the application for the removal was served on the attorneys of Vose on the 17th of April, 1873. Accompanying the petition was an affidavit of Dickerson, under date of June 4, 1873, to the effect that he, Dickerson, and the defendants Roberts *were* citizens of the State of New York.

The cause came on for trial June 9, 1873, and a jury was sworn, when the counsel for Yulee called the attention of the court to the proceedings which had been taken for the removal, and moved to dismiss the complaint for want of jurisdiction. This motion was overruled, and the trial proceeded, resulting in a verdict, by order of the court, against Yulee for $168,589.30, on which judgment was rendered. Exception to the ruling of the court on the question of removal was duly taken. Upon this state of the record, the case was taken by proper proceedings to the Court of Appeals, where the judgment was affirmed, on the ground that the suit was not removable under the act of 1866 when the petition for removal was filed, because the defendant Yulee was then the only defendant. This ruling of the Court of Appeals is now assigned for error.

Mr. Edward N. Dickerson and *Mr. William M. Merrick* for the plaintiff in error.

All the essential facts which entitled Yulee to a removal being presented by the petition, and the requisite bond filed, there was no jurisdiction in the State court to try and determine the suit. That jurisdiction was absolutely ousted by the petition, and any further action there was *coram non judice*. The petition is *ipso facto* a removal of that cause. Any dispute as to the truth of its averments must be tried not in the State court, but in the Circuit Court of the United States, on a motion to remand the cause or otherwise, as that court may direct. If this were not the law, the right of removal might

be defeated by the State court, upon its alleged disbelief of the facts proved by the petitioner, or its misconstruction of the statute. *Bell* v. *Dix*, 49 N. Y. 236. See also *Fisk* v. *Union Pacific Railroad Co.*, 6 Blatchf. 362; s. c. 8 id. 243; *Hatch* v. *Chicago, Rock Island, & Pacific Railroad Co.*, 6 id. 105; *Denistoun* v. *Draper*, 5 id. 336; *Insurance Company* v. *Pechner*, 95 U. S. 183; *Gold Washing and Mining Company* v. *Keyes*, 96 id. 202; *Railway Company* v. *Ramsey*, 22 Wall. 326.

By the terms of the act of July 27, 1866, the right of removal attached to the plaintiff in error at the commencement of the suit, and ran throughout its existence. It was, therefore, not within the power of that court, by its judgment, to make a several case against him, so as to deprive him of a right which exists only where the case assumes a form in which it is capable of a final determination, "so far as it concerns him, without the presence of the other defendants as parties to the cause." It appears, therefore, to be within the very spirit, if not the letter, of the statute for a defendant to wait until, by the judgment of the court or by the alterations of the record, a case is presented which dispenses with the presence of the other defendants. In that light the act of severance performed by the judgment of the court below should have been regarded as removing the only impediment to a change of tribunals, instead of being erected into a bar to such change.

Where the right of removal once attaches, a subsequent event, or an amendment of the pleadings, or a change of the parties cannot divest it. *Clark* v. *Mathewson*, 12 Pet. 164; *Morgon* v. *Morgon*, 2 Wheat. 290; *Kanouse* v. *Martin*, 15 How. 198.

Mr. Philip Phillips for the defendant in error.

It is claimed by the plaintiff in error that if the petition for removal, on its face, be in accordance with the statutory requirement, it is a complete bar to all further proceedings in the State court, and that whether the facts stated in the petition are true or not in the record or *dehors* the record cannot be determined by that court.

Under the twelfth section of the Judiciary Act of 1789 it must appear to the satisfaction of the State court that the defendant is an alien, or a citizen of some other State than that in which

the suit is brought, and that the matter in controversy exclusive of costs exceeds the sum of $500. *Gordon* v. *Longest*, 16 Pet 97. It must also determine the sufficiency of the bond.

The act of July 27, 1866, differs only from that of 1789 in providing for the case where there are several defendants of different States.

In view of that decision, it necessarily follows that, under the act of 1866, it must appear to the satisfaction of the court that the petitioner is one of several defendants, and within the description of the act.

The principle contended for by the plaintiff in error is, that the statement in his petition that he is one of several defendants and that his cause can be determined without the presence of the others binds the State court, although the record of the case in which the petition is filed shows that he is the sole defendant.

In *Sewing-Machine Companies* (18 Wall. 553), the State court refused the application, under the act of March 2, 1867 (14 Stat. 558), made by two of the non-resident defendants, there being another defendant who was a citizen of the same State as the plaintiff. The form of the application was in all things regular; but that court held that the parties were not legally entitled, and on writ of error this court affirmed the judgment. The same question was again made in the Superior Court of Massachusetts; the same ruling was there made, and the judgment was affirmed in *Vannevar* v. *Bryant*, 21 Wall. 41.

It is therefore well established that the State court had authority to determine whether, in the case as made by Yulee, he was entitled to the removal of the cause.

The suit in its original constitution being incapable of removal, the plaintiff in error made no attempt to remove it until the question of the joint liability of all the defendants had been eliminated from it by the court of final appeal as to all the defendants except him, against whom only the judgment of the subordinate court was reversed, and a new trial ordered. Thus the suit had utterly ceased to exist as to all the other defendants. Nothing remained of it except an action in favor of Vose against Yulee on a special averment in the complaint of a particular liability against him, distinct

from the equitable liability charged against them all jointly. The judgment of the tribunal of last resort put the other defendants out of court, or determined that the suit as to them no longer existed.

The act of 1866 provides only for a case where there are other defendants of the same State with the plaintiff. Yulee's case was not, therefore, within its provisions, and the court of original jurisdiction rightfully proceeded with the trial.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

When this suit was commenced in the State court, Vose, the sole plaintiff below, was a citizen of New York, and Yulee a citizen of Florida. If there had been no other defendant but Yulee, he could then have removed the cause to the Circuit Court, under sect. 12 of the Judiciary Act of 1789 (1 Stat. 79), on filing his petition to that effect, and giving the necessary security at the time of entering his appearance. His joinder with other defendants, however, prevented this at that time; and as the suit then stood, it was impossible for him to proceed under the act of 1866, because, although his liability as indorser, in which his co-defendants had no interest, was shown, he was united with them in respect to other matters where there could be no final determination of the controversy, so far as it concerned him, without their presence. When the Court of Appeals decided that there could be no relief in the action, except so far as it related to the liability of Yulee as indorser of the notes, the other parts of the case were disposed of, and that which related to Yulee alone left for final determination. This action of the Court of Appeals separated the controversy in which Yulee was alone concerned as defendant from the rest of the case, and put him for the first time in a condition to invoke the aid of the act of 1866. It is true he was then the sole remaining defendant, but it was in a suit which had been commenced against him and others, and which was still pending undisposed of as to him. Under these circumstances, we are clearly of the opinion that the case was removable, notwithstanding the final judgment in favor of all the other defendants in respect to all the other matters in controversy.

This disposes of the question on which the Court of Appeals based its decision; but as the State court was not bound to surrender its jurisdiction until a case had been made which, upon its face, gave Yulee a right to the transfer, it remains to consider whether the record shows that what was done had that effect.

The petition and accompanying affidavits and bond were filed in court June 5, 1878. This was before the trial and thus in time, under the act of 1866, which in this respect differs from the act of 1789. When the cause was called for trial and after the jury was sworn, the counsel of Yulee directed the attention of the court to the petition for removal, and asked that the complaint be dismissed for want of jurisdiction. This was in effect asking the court to proceed no further in the cause, as it had been withdrawn from the jurisdiction by reason of the proceedings for removal. As no objection was made specifically to the bond which was offered, we are to presume that the security was satisfactory, and that the court refused to with hold further proceedings because a case for removal had not been made.

We think the application was made in time. The trial had not commenced. The most that can be said is that preparations were being made for a trial.

The petition and the affidavits which accompanied it are to be taken together as part of the same instrument. They are also to be considered in connection with the other parts of the record to which they belong.

The evident purpose of the act of 1866 was to relieve a person sued with others in the courts of a State of which he was not a citizen, by one who was a citizen, from the disabilities of his co-defendants in respect to the removal of the litigation to the courts of the United States, if he could separate the controversy, so far as it concerned him, from the others, without prejudice to his adversary. In view of the fact that sometimes in the progress of a cause circumstances developed themselves which made such a transfer desirable, when at first it did not appear to be so, the right of removal in this class of cases was kept open until the trial or final hearing, instead of being closed after an entry of appearance, as was the rule under the act of

1789. We think this gives such a party the right of removal at any time before trial, when the necessary citizenship of his co-defendants is found to exist, and the separation of his interest in the controversy can be made. There is nothing in the act to manifest a contrary intention, and this construction does no more than give the party to whom this new privilege is granted an opportunity of availing himself of any circumstances that may appear in his favor previous to the time when he is called upon finally to act. In *Insurance Company* v. *Pechner* (95 U. S. 183), we held that the act of 1789 clearly had reference to the citizenship of the parties when the suit was begun, because the party entitled to the removal was required to make his election when he entered his appearance. But here a party otherwise entitled to a removal is embarrassed by the presence of those whom he cannot control. In view of this, the time of making his election is extended until he is brought to trial; and it is not at all in conflict with that case to say that he may avail himself of his release from the operation of the disabilities growing out of his joinder in the action with other defendants, whenever that release occurs, if before trial or final hearing as to him.

When the application for removal was made, it appeared on the face of the record that Yulee, a citizen of Florida, had been sued with other defendants by Vose, a citizen of New York, in the courts of the State of New York, and that a part of the other defendants with whom he had been joined were then citizens of the State of New York. It also appeared that the controversy, so far as it concerned Yulee, not only could be, but actually had been by judicial determination, separated from that of the other defendants. This, as we think, gave Yulee a right to the transfer of his part of the suit to the Circuit Court, and required the State court to proceed no further. Inasmuch as the Court of Appeals has sustained the judgment given after the refusal to permit the transfer to be made, the judgment of the Court of Appeals will be reversed, and the cause remanded for such further action in accordance with this opinion as may be necessary; and it is

So ordered.

HARTELL v. TILGHMAN.

1. A suit between citizens of the same State cannot be sustained in the Circuit Court as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention.
2. Relief in such a suit is founded on the contract, and not on those laws.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. William Henry Rawle and *Mr. M. D. Connolly* for the appellants.

The court below had no jurisdiction. The parties were all citizens of the same State. The suit was founded upon a contract between them, and did not arise under a statute of the United States. *Wilson* v. *Sandford*, 10 How. 99; *Hartshorn* v. *Day*, 19 id. 211; *Slemmer's Appeal*, 58 Pa. St. 164; *Blanchard* v. *Sprague*, 1 Cliff. 288; *Goodyear* v. *Day*, 1 Blatchf. 565; *Merserole* v. *Union Paper Collar Co.*, 6 id. 356; *Goodyear* v. *Union India-rubber Co.*, 4 id. 63; *Burr* v. *Gregory*, 2 Paine, 426; *Hill* v. *Whitcomb*, 1 Holmes, 317; *Pulte* v. *Derby*, 5 McLean, 328; Curtis, Patents, sect. 496.

When the defendant's original use of a machine or a process for which letters-patent have been granted to another is unlawful, he is *prima facie* an infringer, and the Federal jurisdiction attaches to prevent a violation of a right secured by the laws of the United States. But where such use is lawful, he is *prima facie* not an infringer, and that jurisdiction does not attach. The rights involved rest solely upon contract, and it is only when a breach of it is shown that the continued exercise of them can be enjoined.

Mr. George Harding, *contra*.

The bill is founded on letters-patent. The relief sought is an injunction, a discovery, and an account, and not the rescission, the enforcement, or the construction of a contract of license. The court below therefore had jurisdiction. *Brooks* v. *Stolley*, 3 McLean, 523; *Woodworth* v. *Wood*, 1 Blatchf. 165; *Wilson*

v. *Sherman*, id. 538; *Woodworth* v. *Cook*, 2 id. 150; *Wilson* v. *Sanford*, 10 How. 99; *Pulte* v. *Derby*, 5 McLean, 336; *Day* v. *Hartshorn*, 3 Fish. 32; *Goodyear* v. *Congress Rubber Company*, 3 Blatchf. 453; *Judson* v. *Union Rubber Company*, 4 id. 66; *Bloomer* v. *Gilpin*, 4 Fish. 54; *Blanchard* v. *Sprague*, 1 Cliff. 288; *Merserole* v. *Union Paper Collar Co.*, 3 Fish. 483; *Littlefield* v. *Perry*, 21 Wall. 205; *Magic Ruffle Company* v. *Elm City Company*, 13 Blatchf. 157.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the Eastern District of Pennsylvania, in which Tilghman, the appellee, describes himself in his bill as a citizen of that State, and the defendants as citizens of the same State. It thus appears affirmatively that, if the court had jurisdiction of the case, it was for some other reason than the citizenship of the parties; and it is argued by appellants that there is no such other ground for the jurisdiction.

The counsel for appellee, however, insists that it is "a case arising under the patent laws of the United States," and therefore cognizable in the circuit courts of the United States, on account of the subject-matter of the suit.

Subdivision 9 of section 629 of the Revised Statutes, which section is devoted to a definition of the powers of that court, gives it original jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States."

This section of the revision is founded on section 55 of the act of July 8, 1870, which declares that all actions, suits, controversies, and cases arising under the patent laws of the United States "shall be originally cognizable, as well at law as in equity, in the circuit courts of the United States;" and that those courts shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and on a decree for infringement complainant shall be entitled, in addition to profits, to the damages he has sustained thereby. The language of the act of 1836 is substantially the same, except as

to the damages to be recovered. We are, therefore, to decide whether this suit is one arising under the patent laws of the United States, within the meaning of the clause we have cited.

If a man owning a tract of land, his title to which is a patent from the United States, should sell or lease that land, and a controversy should arise between him and his vendee or lessee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights was a suit arising under the land laws of the United States; and this would be beyond question if the defendant, admitting the title of plaintiff to the land, should make no other defence than such as was founded in rights derived from plaintiff by contract. That is the case before us, with the variance that plaintiff's title is to a patent for an invention instead of a patent for land.

His bill begins by a statement that he is the original inventor and patentee of a process for cutting and engraving stone, glass, metal, and other hard substances. It is the one known as the sand-blast process.

He then sets out what we understand to be a contract with defendants for the use by the latter of his invention. He declares that defendants paid him a considerable sum for the machines necessary in the use of the invention, and also paid him the royalty which he asked, for several months, for the use of the process, which he claims to be the thing secured to him by patent. He alleges that after this defendants refused to do certain other things which he charges to have been a part of the contract, and thereupon he forbade them further to use his patent process, and now charges them as infringers.

The defendants admit the validity of plaintiff's patent. They admit the use of it and their liability to him for its use under the contract. They set out in a plea the contract as they understand it, and the tender of all that is due to plaintiff under it, and their readiness to perform it.

What is there here arising under the patent laws of the United States? What controversy that requires for its decision a reference to those laws or a construction of them?

There is no denial of the force or validity of plaintiff's patent, nor of his right to the monopoly which it gives him, except as he has parted with that right by contract.

The complainant's view of the case is that there was a verbal agreement that he should prepare and put up in defendants' workshop ready for use such parts of the machinery as were of special use in his invention, for which defendants were to pay him at all events. That after this was done defendants should take a license for the use of his invention; that this license was to be the same in its terms as that given to all other persons who used the process, and among these were the right on the part of the patentee to visit the works of the defendants at all times, as well as to inspect their books, with a view to ascertain the amount of work done on which royalty was due. Also, that once every year the complainant had a right to fix the tariff of rates to be paid by defendants, by increasing it if he so determined, with no other limitation than that the increase of rates should apply equally to all licensees of the patent.

It is established by evidence of which there is no contradiction that complainant did furnish and put in place the machines, for which defendants paid him $649. That complainant also furnished a schedule of the rates of royalty to be paid on the different kinds of work to which the patented process was to apply, and that defendants made monthly returns and monthly payments according to this schedule, which were received by plaintiff without objection. That besides the machinery purchased of plaintiff, the defendants had expended about $3,000 in erecting a blower for the use of the sand-blast of complainant's process.

At this stage of the affair complainant tendered to defendants two blank forms of license to be signed by both parties, containing the two conditions we have mentioned. After some fruitless negotiations, defendants refused to sign these papers, and complainant thereupon, as we have said, forbade them to use the process, and on their disregard of this admonition brought his bill in chancery for an injunction, and for an account of profits and additional damages.

The argument of counsel is that defendants, having refused

to sign the papers tendered them, are without license or other authority to use his invention, and are naked infringers of his rights under the acts of Congress.

The defendants say that they never agreed to accept a license with the conditions we have mentioned in them; that they never agreed to permit complainant's agents to inspect all the processes of their own works, some of which were valuable secrets, nor, after they had expended thousands of dollars in preparations for the use of his process, to place themselves under his arbitrary control as to the prices they should pay for the use of his invention. And they say that when the machines were in full operation and paid for, and the schedule of rates had been furnished by complainant and accepted by them, the contract was complete, and needed no such written agreement as the one tendered them for signature.

Such were the pleadings and the principal conceded facts on which the court was called to act, and we pause here to consider the question of jurisdiction on the case thus stated.

Burr v. *Gregory* (2 Paine, 426), one of the earliest cases on this subject, was a bill to procure a decree that the assignment of a patent by Burnap to Gregory was to the extent of three-fifteenths for the benefit of complainant, Burr, and to have a conveyance executed accordingly. Mr. Justice Thompson said that if the validity of the patent or of the assignment could be drawn in question, the Circuit Court might have jurisdiction. But as it was a matter which grew out of the contract, and there was no averment of citizenship, the amount prayed for, growing out of the profits, did not vary the case so as to give jurisdiction. This decision was made before the act of 1836, but is indicative of the sound doctrine that controversies arising out of contracts concerning patent-rights did not necessarily belong to the Federal courts.

The next case in chronological order was founded on the act of 1836, the language of which, as we have seen, was on this point preserved in the act of 1870, and is embodied in the Revised Statutes. It is the only authoritative construction of the statute on that point made by this court, except *Littlefield* v. *Perry* (21 Wall. 205), which is in accord with it, and we think it covers the case under consideration. We refer to

Wilson v. *Sanford* (10 How. 99), and the opinion was delivered by Mr. Chief Justice Taney.

The complainant was assignee of the Woodward planing-machine patent, and had licensed the defendants to use one machine upon payment of $1,400, of which $250 was paid down, and notes payable in nine, twelve, eighteen, and twenty-four months given for the remainder. This license contained a provision that if either of the notes was not punctually paid at maturity, all the rights under the license ceased and reverted to "Wilson, who became reinvested in the same manner as if the license had never been made." Upon failure to pay the first two notes, Wilson brought his bill, charging that notwithstanding this, the defendants were using the machine, and thus infringing his patent. He prayed an injunction, an account, &c.

The bill was dismissed in the court below, and on appeal to this court the appeal was dismissed because the amount in controversy did not exceed $2,000. If, however, it had been a case arising under the patent laws of the United States, no sum was necessary to give jurisdiction.

The precise question, therefore, to be decided was whether the suit arose under the patent laws of the United States; and the Chief Justice, after reciting the clause in the act of 1836 which gives the circuit courts jurisdiction in all such cases, proceeds to discuss that question in this manner: "The peculiar privilege," he says, "given to this class of cases was intended to secure uniformity of decision in the construction of the act of Congress in relation to patents. Now, the dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to

be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction, unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not in a court of chancery depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent-rights. And whenever a contract is made in relation to them, which is not provided for and regulated by Congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal."

Let us see how closely these remarks and the case to which they related apply to the present case. In that case a contract was made under which the defendant entered on the use of the invention. This is also true of the case before us. In that case it is charged that an act to be performed by the defendant and licensee under the contract was not performed, to wit, payment of the notes. In the case before us it is alleged in like manner that the defendants failed to perform part of the contract, to wit, to sign a license.

In that case the complainant asserted, as in this, that all right under the contract had ceased, and he was remitted to his original rights under the patent, and could, therefore, sue in the Federal court under the statute; but the court held this to be erroneous, and that the rights of the parties depended on the contract and not on the statute. Why does not the same rule apply to the present case? Wilson's case was stronger than Tilghman's case, for two reasons:—

1. Because the contract was all in writing, and there was no dispute about its meaning. Here it was in parol, and there is not only dispute about its meaning, but the rights of the parties depend almost wholly upon the points in dispute, which have no relation to the patent laws of the United States.

2. In Wilson's case there was an express provision in writing that a failure to pay any note when due forfeited the license and reinvested Wilson with all his original rights. No such provision is set up in the contract between Tilghman and the defendants.

In this case, as in that, the defendants had bought the machine

and paid for it and used it. In this case, as in that, the right to its further use depended upon the contract, and was to be determined by its construction and effect. In this, as in that, the case, in Judge Taney's language, "does not arise under an act of Congress, nor does the decision depend upon the construction of any law in relation to patents. The rights of the parties depend altogether upon common-law and equity principles."

In *Goodyear* v. *Union India-rubber Company* (4 Blatchf. 63), where the licensees had neglected for three years to pay the royalty which they had agreed to pay, and refused to permit their books to be inspected, and where one of the prayers of the bill was that until they had so accounted and paid the royalty due they should be enjoined from the use of the invention, Judge Ingersoll held that the bill stated no case arising under the patent laws of the United States, but did not make a case for relief on the contract. Judge Blatchford stated the doctrine still more strongly in *Merserole et al.* v. *Union Paper Collar Co.*, 6 id. 356.

In the case of *Blanchard* v. *Sprague* (1 Cliff. 288), decided by Mr. Justice Clifford in 1859, he said: "No dispute arises in the case under any act of Congress, nor does the decision depend in any respect on any law of Congress in relation to patents. On the contrary, it arises entirely out of the agreement, express or implied, for a license, and the rights of the parties depend altogether upon the ordinary rules of law. . . . What the complainant really claims is that he terminated or revoked the license under the agreement which previously existed between the parties, by giving the notice, and that the respondent subsequently continued the use of the machine without any stipulation as to the rate of tariff." How precisely descriptive of the case under consideration, in which Tilghman, claiming that he has terminated at his own option the arrangement under which the defendants had been operating, can now sue in the Federal court for an infringement in violation of the acts of Congress. In the case mentioned Judge Clifford held otherwise.

To the same purport is *Hill* v. *Whitcomb*, decided by Judge Shepley, and reported in 1 Holmes, 317.

It may be conceded that the case of *Brooks* v. *Stolly* (3 McLean, 523), decided by Mr. Justice McLean on the circuit prior to the act of 1836, is, in some respects, opposed to the authorities we have cited. But in them it stands alone, and is not supported by the better reason.

We may be asked, if we concede the complainant's statement of the verbal agreement to be correct, what remedy has he on it? The answer is very easy. He can establish his royalty once every year, and sue at law and recover every month or every year for what is due. If he desires to assert his right of examining the works of the defendants, he can, in a proper case made, compel them to submit to this examination. If he desires to enforce the agreement for executing a written contract of license, he can bring a suit in equity for specific performance, and with or without that specific relief ask the court to enjoin them from using the patented process until they execute the agreement and comply with its requirements. All these and perhaps other remedies are open to him to enforce the contract. He may also file a bill in chancery to have it annulled or set aside because of the difficulties placed in the way of its fair execution by the defendants.

Not content, however, with all these remedies, the complainant assumes that he has, under the condition of things he has proved, the right in himself to abandon the contract, to treat it as a nullity, and to charge the defendants as infringers, liable as trespassers under the act of Congress to pay both profits and damages.

The analogy of an action of ejectment to recover possession of land in cases of a broken contract of sale is referred to. The analogy, however, is imperfect and deceptive. That action is one at law, depending on the existence of the strict legal title to land in plaintiff, and the doctrine that the right of possession follows the title. It is a peculiar action, founded on a peculiar doctrine limited to real estate, and liable to be defeated in equity by a bill for specific performance and an injunction.

In the case of a patent, plaintiff does not recover any specific property, real or personal. He recovers damages or compensation for the use of his monopoly; and if he has made a bargain

with the defendant, his right to rescind or annul it must depend on all the equitable circumstances of the case.

Here, where he has sold and received a considerable sum for a machine of no use for any other purpose; where the defendants have spent several thousand dollars on other machinery, which is also valueless except in connection with the use of this process; where defendants have paid and plaintiff received for many months the royalty which plaintiff established, and are still ready and willing to continue payment; and where the contract being in parol the parties differ about one or two of its minor terms, — we do not agree that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation. But until so rescinded or set aside, it is a subsisting agreement, which, whatever it is, or may be shown to be, must govern the rights of these parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity.

Such a case is not cognizable in a court of the United States by reason of its subject-matter, and as the parties could not sustain such a suit in the Circuit Court by reason of citizenship, this bill should have been dismissed.

The decree of that court will, therefore, be reversed, with directions to dismiss the bill without prejudice; and it is

So ordered.

MR. JUSTICE STRONG did not hear the argument nor take any part in the decision of the case.

MR. JUSTICE BRADLEY, with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE SWAYNE, dissenting.

I dissent from the opinion of the court in this case. I cannot see the slightest room for doubt as to the jurisdiction of the Circuit Court. The suit is a bill in equity, which sets up letters-patent issued to the complainant for a new and useful improvement in cutting and engraving stone, metal, and glass;

and complains that the defendants are infringing said patent by using the said process without any license therefor, and praying an injunction, and decree for profits and damages. The bill also states the fact that negotiations had passed between the complainant and the defendants for a license to use the said invention, but that the defendants had failed to comply with the conditions, and hence had no right to continue the use; but persisted in doing so. This is the substance of the bill. It is a clear case, it seems to me, "arising under the patent laws of the United States," and is therefore properly cognizable by the Circuit Court of the United States under sect. 629, art. 9, and sects. 4919 and 4921 of the Revised Statutes, and the laws from which that article and those sections were compiled. The cause of action, or ground of relief, is the infringement of the patent. The plaintiff chooses to place himself on that ground alone. By doing so he runs the risk of any defence which would show a right to use the invention, whether license from himself, invalidity of the patent, non-infringement, or any other proper defence to a suit on a patent. He states in his bill, as he had a right to do by the rules of equity pleading, what the supposed defence would be, and answers it. This anticipation of the defence does not change the nature of the suit in the least. Perhaps he need not have anticipated the defence, but might have left the defendants to develop it in their answer. Certainly in that case the character of the defence would not have ousted the court of its jurisdiction. If a cause of action is cognizable by the United States court, the defendant cannot oust that jurisdiction by his defence to the action. He may defeat the action, but he cannot destroy the jurisdiction.

It will not do to say that the remedy of the complainant was a bill for a specific performance of the parol agreement that the defendants would take a license. Perhaps he had such a remedy. But he did not choose to pursue it. He waived it by suing as for an infringement. He chose to take the responsibility of having a right to put an end to the agreement without juridical aid. Having done this, his only remedy was to sue on the patent as for an infringement. He certainly had a right to do this. He was not bound to sue for specific perform-

ance. Nor was he bound to sue for the avoidance of the supposed agreement. It may be that it would have been his better remedy. It may be that the result of the negotiation is to create a defence to the suit for infringement, amounting to a parol leave and license, or a license in law. If so, he has only made a mistake in suing as for an infringement of his patent, and may fail in his action. How that may be it is unnecessary now to inquire, since the majority of this court has decided the case on the question of jurisdiction. But whether it be so or not, the character of the present suit is not changed, as a suit for injunction and damages for the alleged infringement.

How, I would ask, could a State court have determined this suit? Suppose the defence of license, express or implied, had failed, what would the State court have done? Could it have taken an account of profits? Could it have assessed damages for the infringement? Could it have granted an injunction to restrain the defendants in the use of the invention? This would have been a new branch of jurisdiction and inquiry for it to have assumed. It is too obvious for argument, as it seems to me, that no State court has, or could rightfully take, jurisdiction of the suit.

It is perfectly well settled, I admit, that where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws. But where infringement of the patent is the ground of action, and redress is sought therefor, the case does arise under the patent laws, and is cognizable in the Federal court, — no matter what collateral issues may be raised by the defendant. He may set up that the patent is void, that he does not infringe, that he has a license, or a release, or what not; the Federal court is fully competent to try any of the issues thus made.

The case principally relied on by the majority of the court is that of *Wilson* v. *Sanford*, 10 How. 99. But there the bill prayed to have the license declared void. The Chief Justice said: "The object of the bill is to have this contract set aside, and declared to be forfeited, and the prayer is that the appellant's reinvestiture of title to the license granted to the appellees,

by reason of the forfeiture of the contract, may be sanctioned by this court, and for an injunction." In such a case it may be that relief is properly to be sought in the State court. But if the question were a new one, I should think that where the complainant seeks damages for infringement and an injunction against the use of the invention, making that the basis of his suit, it would not be improper, nor oust the jurisdiction of the Federal court, to join in such a bill, as ancillary to the principal relief sought, an application to avoid an inequitable license held by the defendant. I see nothing incongruous in the joinder of such matters in the bill. It seems to me that the views on this subject, expressed in *Brooks* v. *Stolley* (3 McLean, 523), are perfectly sound and just. There the complainant had given a license to use a patented invention, determinable on non-payment of the royalty. On failure to pay he filed his bill for an injunction and damages, at the same time stating the granting of the license, and the failure to perform the conditions of it. Mr. Justice McLean said: "It is suggested that, as the whole controversy in the case arises under the contract of license, the parties to which being citizens of this State, the Federal court cannot take jurisdiction. This objection would be unanswerable, if no right were involved in the controversy except what arises out of the contract, as, for instance, the Circuit Court could take no jurisdiction under the contract of an action, merely to recover the sums agreed to be paid by the defendant; but in the present aspect of the case, it is not limited to the contract. The complainants set up their right under the patent, and allege that the defendant is infringing that right; that the license affords no justification whatever to the defendant. The right then of the complainants to an injunction is not founded by them on the contract, but on the assignment of the patent. If the object of the bill were merely to enforce the specific execution of the contract, the Circuit Court of the United States could exercise no jurisdiction in the case." See also Curtis, Patents, sect. 496, to the same purpose, citing this opinion.

It seems to me, with all due submission, that if we are to have regard to "the better reason," we shall find it expressed in these remarks of Mr. Justice McLean.

It may be laid down, I think, as a general principle, that where a case necessarily involves a question arising under the Constitution or laws of the United States, and cannot be decided without deciding that question, it is a case arising under said Constitution and laws, and may be brought, as the law now stands, in the Circuit Court of the United States, although other questions may likewise be involved which might be tried and decided in the State courts. I do not believe in the doctrine that the presence of a question of municipal law in a case which necessarily involves Federal questions can deprive the Federal courts of their jurisdiction. It is too narrow a construction of the judicial powers and functions of the Federal government and its courts.

But in this case the complainant asks no relief in relation to the supposed agreement between him and the defendants. He places himself solely on his rights accruing under the patent and on the defendants' infringement of them. I think, therefore, the jurisdiction of the Circuit Court of the United States was undoubted.

COLBY v. REED.

1. Unless the contract so provides, the demand of one of the parties thereto that the other shall perform his agreement need not be in writing.
2. Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount.
3. In such an action the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, the property for the non-delivery of which the action was brought.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. Edwin H. Abbot for the plaintiff in error.

Mr. Matt. H. Carpenter, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Tender, when the demand is of money, for a definite sum or for an amount capable of being made certain, may at common law be made on the very day the money becomes due, but it will constitute a defence only when made before the action is brought. Chitty, Contr. (10th ed.) 732, 733; 2 Pars. Contr. (6th ed.) 148; 9 Bac. Abr., Tender D. 321; *Suffolk Bank* v. *Worcester Bank*, 5 Pick. (Mass.) 106; *Pitcher* v. *Bailey*, 8 East, 171; *Briggs* v. *Calverly*, 8 T. R. 629.

In actions of debt and assumpsit the principle of the plea of tender is that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender. Such a tender and refusal do not discharge the debt, and hence the plea must proceed to allege that the defendant is still ready to perform, and it must contain a *profert in curia* of the money tendered. *Ayers* v. *Pease*, 12 Wend. (N. Y.) 393.

Arrangements were made between the parties to advance material aid in the construction of a certain land-grant railroad, and to promote that object the defendant agreed with the plaintiff, in writing under seal, that he would take stock in the company to the amount of $200,000, and that he would pay or deliver to the order of the plaintiff $45,000 of the proceeds of the subscription. Pursuant to the agreement, the defendant subsequently paid the agreed sum in money, and received the certificates of the stock to the same amount. Progress was made in the undertaking, but it turned out that more money was needed to complete the enterprise; which made it necessary that the same parties should subscribe for an additional hundred thousand dollars of the stock. It appears that they were willing to do so; but that the plaintiff could not furnish his proportion of the money for the new subscription, and that the defendant, in consideration of receiving $5,000 out of the plaintiff's stock, agreed to pay the entire amount of the additional subscription and to take the whole of the new stock, which left in his hands only $40,000 of the original stock belonging to the plaintiff. Money to the amount

of $2,000 was, about the same time, borrowed for six months by the plaintiff of the defendant, on a pledge of $8,000 of plaintiff's stock in the hands of the defendant, which the record shows was never repaid, leaving in the possession of the defendant only $32,000 of the first subscription.

Throughout these transactions the relations between the parties were amicable; but they subsequently became hostile, and on the 28th of May, 1875, the plaintiff instituted the present suit in the Circuit Court, in which he claimed judgment against the defendant for the stock of the railroad in his hands to the amount of $45,000, with interest, as alleged in the complaint.

Service was made; and the defendant filed an answer, setting up several defences: 1. That the allegation that he refused to deliver the stock mentioned in the complaint is not true. 2. That no proper demand for the delivery of the same was ever made. 3. That the demand made was for the delivery of $45,000 of the stock when the defendant well knew that he was only entitled to demand $32,000 of the same, and the defendant avers that he always was and still is ready and willing to deliver the true amount. 4. That the plaintiff is indebted to the defendant in the sum of $2,000, for which he claims an allowance as a set-off or as a counter-claim. 5. That the value of the stock is much below par, and that the pledge to him for the loan is inadequate as security.

Preliminary matters being closed, the parties went to trial. Evidence was introduced on both sides, and the court submitted certain questions to the jury, to which they responded to the effect following: That the plaintiff before the commencement of the action made a demand of the stock from the defendant, and that the defendant refused to deliver the same. That the parties entered into the agreement set forth in the answer, by which the plaintiff was to deliver to the defendant the excess of the stock originally subscribed, above $40,000, in the event that it should become necessary to make the additional subscription of $100,000, and that the notice required of the defendant in that contingency was waived by the plaintiff; and the jury also found that the amount of stock which the plaintiff was entitled to demand and receive

was only $32,000, and that the cash value of the same was and is $9,600, which finding appeared to be satisfactory to the plaintiff, as he moved for judgment in his favor; but the defendant filed two motions, — one that the plaintiff be ordered to accept the stock found to be due in mitigation of damages, and the other that a new trial be granted.

Hearing was had, and the court overruled the motions of the defendant and rendered judgment for the plaintiff in the sum of $7,641.72. Before doing so, however, the court adjusted the equities between the parties as follows: Interest in favor of the plaintiff was added to the sum found due by the jury as the value of the stock, and the court, deducting therefrom the counter-claim and interest set up by the defendant, rendered judgment for the balance.

Seasonable exceptions were filed by the defendant and he sued out the pending writ of error.

Numerous errors are assigned by the defendant, but in the view taken of the case it will not be necessary to give them a separate examination. Attention will be called to the substantial issues presented in the pleadings and to the material questions which arose in the progress of the trial and in the rendition of the judgment.

Both parties agree that the controversy grew out of a contract between them, and that the redress sought by the plaintiff is compensation for the alleged breach of it and the failure of the defendant to comply with its terms. Every pretence of conversion, therefore, may be dismissed in the outset without the least consideration, as there is nothing either in the cause of action, or the form of the remedy, or in the allegations of the complainant, or in the averments of the answer, or in the evidence introduced by either party, which gives such a theory any support whatever. Instead of that, the plaintiff set up the agreement and alleges that the defendant broke it, and he claims compensation for the damage he suffered from its nonperformance by the defendant. Demand of performance is also alleged by the plaintiff, which is explicitly denied by the defendant, who avers in his answer that he was always ready and willing to perform to the full extent of his obligation under the agreement.

Neither the answer nor the evidence shows that the defendant ever did perform the agreement to deliver, but what he alleged and attempted to prove was that the plaintiff claimed $13,000 of stock more than he, the defendant, contracted to deliver, and his theory is that the demand being in excess of the obligation created by the contract, was null and of no effect, and inasmuch as the demand exceeded the right, he was not required to perform what the contract required.

Two issues of law were presented by the defendant in respect to the alleged demand: 1. That it must be in writing, and that an oral demand was insufficient. 2. That a request to deliver more property than the party is entitled to receive and a failure to deliver placed on that ground do not in law constitute a sufficient demand and refusal to sustain an action like the one before the court.

Had the contract contained the stipulation that the demand should be in writing, there would be much force in the suggestion; but inasmuch as the contract is silent upon the subject, the court is of the opinion that the ruling of the Circuit Court that it might be verbal or in writing is undoubtedly correct. *Smith* v. *Young*, 2 Dev. & Bat. (N. C.) 26.

Responsive to the second request, the judge told the jury that where a party demands more than he is entitled to receive, that that circumstance *alone* will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known, and clearly distinguishable from that to which the demanding party had no right; that if the plaintiff demanded $45,000 of the stock when he was only entitled to $32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject. 2 Greenl. Evid., sect. 604.

Matters of fact in the case need no examination, as they are found by the jury, and are not the subject of review in this court. Actual demand, it is conceded, was necessary to complete the cause of action, and the court is of the opinion that

the demand was not vitiated because it was for too much, as the party of whom it was made was under no obligation to tender more than was due. Chitty, Contr. (10th ed.) 738. Both demand and refusal are established by the special verdict, which is all that need be said upon the subject.

Two other assignments of error deserve to be considered, and they may be examined together, as they involve the same question. They are as follows: 1. That the court erred in denying the motion of the defendant to require the plaintiffs to accept the stock tendered by the defendant to the plaintiff in open court in reduction of the damages. 2. That the court erred in rendering judgment for the full value of the stock in money, and in not applying the stock deposited in court in mitigation of damages, at its value as fixed by the jury.

Tender of the stock before breach of the condition or before the commencement of the action is not pretended, nor is it pre tended that the defendant ever made a money tender of the debt due to the plaintiff, either before or after the action was commenced. Such a tender, if made before action brought and kept good, is a defence to the action, as the money to pay the debt remains in the court, and the party plaintiff is not entitled to prevail unless the sum tendered was insufficient, nor is it questioned that such a tender in a proper case, and payment of the money into court, may be made after action brought; but the rule is universal, that in that event the tender and the payment must include the costs to that time as well as the debt. Addison, Contr. (6th ed.) 954.

Authority undoubtedly exists in the defendant to tender the debt, if it is of a definite amount, before action brought; but it is equally well settled, even if it be large enough to pay the whole debt, that it is utterly nugatory after action brought, unless it also include a sum sufficient to pay the costs. *Emerson* v. *White*, 10 Gray (Mass.), 351; *The People* v. *Banker*, 7 How. (N. Y.) Pr. 258.

Exceptional cases may be found, but they arise in States where the matter is regulated by statute. *Ashburn* v. *Poulter*, 35 Conn. 553; *Call* v. *Lothrop*, 39 Me. 434; Rev. Stats. (Me.) 642; Gen. Stats. (Mass.) 671.

No such regulation has ever been adopted by the State in

which this controversy arose, from which it follows that it must be governed by the general rules, which do not give the right of tender after action brought, except in the form and under the conditions before explained.

Concede that, and still it is insisted by the defendant that the court erred in refusing his request to order the plaintiff to accept the certificates of stock in mitigation of damages, which presents the principal question in the case.

Power to tender back the property in trover, where the gist of the action is conversion, is certainly vested in the defendant, and its exercise is a matter of frequent occurrence, where it appears that the property is in the same condition as when taken. Such a right may doubtless be exercised where the charge is conversion or a wrongful taking even after action brought, if it be accompanied with a tender of costs and intervening damages. *Rutland & Washington Railroad Co.* v. *Bank of Middlebury*, 32 Vt. 639; *Kaley* v. *Shed*, 10 Metc. (Mass.) 317.

There can be no manner of doubt that the defendant in actions of trover and trespass *de bonis asportatis*, in cases where the taking was not unlawful and the property is not essentially injured, will be allowed to surrender the property in specie in mitigation of damages. *Hart* v. *Skinner*, 16 Vt. 138; *Fisher* v. *Prince*, 3 Burr. 1363; *Pickering* v. *Truste*, 7 T. R. 54.

Courts, beyond doubt, may in a proper case, where the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages against his wishes; and the rule is that the return of the property in such a case will reduce the damages to those actually sustained for the wrongful taking, together with intervening damages, and costs. *Yale* v. *Saunders et al.*, 16 Vt. 243.

Orders of the kind are frequently given in actions of trover and trespass *de bonis asportatis*, but the practice is not applicable in actions of assumpsit for a breach of contract, the rule being that the party, if he desires to stop the litigation, must adopt the measure prescribed by the common law, except in jurisdictions where a different mode of proceeding is prescribed by statute.

Judgment affirmed

McBURNEY v. CARSON.

1. Where a suit in equity, to enforce a lien on property within the district, was pending at the time of the passage of the act of June 1, 1872 (17 Stat. 196), and a party who was not an inhabitant of, or found within, the district was thereafter, by an amended bill, made a defendant, — *Held*, that the court could acquire jurisdiction in the mode prescribed by the thirteenth section of that act.
2. The objection that the defendants to an amended bill were all necessary parties to a supplemental bill filed in the same cause, cannot be made for the first time in this court.
3. A., seised of lands situate in South Carolina, died in 1856. By his last will and testament he appointed B. his executor, with power to sell them and hold the proceeds in trust for his widow and two minor children, — the interest on one-third of said proceeds to be paid to the widow, and that on the other two-thirds to be applied to the education and support of the children until they should attain the age of twenty-one years, when the principal was to be paid to them. B. sold the lands to C. in 1857 for $50,000, receiving therefor $15,000 in cash and the latter's bonds for the deferred payments, secured by a mortgage on the lands, which was duly recorded. In 1861, the widow removed to New York, where she has since resided. In 1863, C. sold the lands to D. for $100,000 in Confederate treasury notes. In that currency, C. paid his bonds to B., who surrendered them, entered the mortgage as satisfied, and invested the currency in Confederate bonds. The children having in 1866 come of age, and assigned their interest in the estate to their mother, she, on the ground that the surrender of C.'s bonds and the cancellation of the mortgage were procured by fraud, brought her bill praying that the bonds of C. be decreed to be subsisting securities, and the mortgage a valid lien on the lands. The court below decreed accordingly. *Held*, that the decree was proper.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The facts are stated in the opinion of the court.

Mr. Edward McCrady for the appellants.

Mr. James Lowndes and *Mr. Clarence A. Seward*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case was before us at a former time. 19 Wall. 94. The decree of the Circuit Court was reversed, and the cause remanded for further proceedings. Such proceedings have been had, and it is again before us by appeal. A brief statement of the facts and of the further history of the case is necessary.

William Carson, of South Carolina, died in August, 1856, leaving a widow, Caroline, and two minor sons, William and James. He left considerable personal property, and a plantation known as Dean Hall. By his will he appointed Robertson and Blacklock his executors, and directed all his estate to be sold on such terms as they should deem proper. The proceeds, after the payment of his debts, were to be divided into three parts, to be held in trust by his executors. The interest of one-third was to be paid to the widow. The interest of the other two-thirds was to be devoted to the education and support of the two sons until they should come of age. The principal was then to be paid over to them.

The executors sold Dean Hall to Elias N. Ball, and took his bonds and mortgage for a part of the purchase-money. In 1863, Ball sold the property to Hyatt, McBurney, & Co., a firm consisting of Hyatt, McBurney, Gillespie, Hazletine, and McGhan. The conveyance was made to Gillespie and McBurney. The firm paid for the property in Confederate treasury notes. Out of the proceeds Ball paid his bonds to Robertson, and took them up and discharged the mortgage. Blacklock, the other executor, was then absent from the country, and upon his return refused to recognize the transaction. Hyatt sold his interest in the plantation to the other members of the firm, and Gillespie and McBurney gave him a lien upon it to secure the payment of the purchase-money. When the executors sold this property to Ball, they sold to him also a considerable amount of personal property on credit, and took his bond, with W. J. Ball as surety, for the price.

As the sons of the testator came of age they transferred their entire interest in the estate of their father to their mother. She filed the bill to set aside the cancellation of the mortgage upon Dean Hall as fraudulent and void, and to charge Elias N. Ball and his surety with the amount due upon their bonds given for the personal property. The bill did not make any member of the firm of McBurney & Co. a party, except McBurney. Hyatt, it appeared, was a resident of New York, of which State the complainant was also a resident and citizen. Elias N. Ball was made a party, but was not served with process. The Circuit Court decreed in favor of

the complainant. This court held that Hyatt was not an indispensable party, as the decree would not affect his rights, but that Ball and Gillespie were such parties. The decree was therefore reversed, and the cause remanded for further proceedings.

After the cause was reinstated in the Circuit Court, the complainant filed an amended bill. In the mean time, Elias N. Ball had removed to the State of New Jersey, had there gone into bankruptcy, and Elias N. Miller had been appointed his assignee. Ball afterwards received his discharge and died. The defendants named in the bill were McBurney, McGhan, Gillespie, and Hazletine, being all the members of the firm of Hyatt, McBurney, & Co., except Hyatt, Robertson, and Blacklock, the executors, and Elias N. Miller, the assignee in bankruptcy of Ball. We hold, as we held before, that Hyatt is not an indispensable party. Hazletine could not be found. He was thereupon notified pursuant to the act of Congress of June 1, 1872 (17 Stat. 198, sect. 13). It is objected that the act could not apply to a suit pending when it was passed. It was not applied retrospectively, but only as to parties sought to be brought into the case more than a year after its passage. Such a result is consistent with its terms. There is no reason why it should not be so applied. It is a remedial statute, and should be liberally construed to accomplish the end in view. This construction is abundantly supported by well-considered authorities. *Southwick* v. *Southwick*, 49 N. Y. 510; *Ex parte Lane*, 3 Metc. (Mass.) 213; *Holyoke* v. *Haskins*, 9 Pick. (Mass.) 259; *Rader* v. *Southeasterly Road, &c.*, 36 N. J. L. 273; *Tilton* v. *Swift & Co.*, 40 Iowa, 78; *People* v. *Mortimer*, 46 Cal. 114; Cooley, Const. Lim. 381.

But as we held before, and still hold, that Hazletine was not an indispensable party, we forbear to pursue the subject further. He is sufficiently represented by his copartners, Gillespie and McBurney, in whom is vested the legal title of the Dean Hall property. Both of them appeared and answered. Miller, the assignee in bankruptcy of Ball and Gillespie, was ordered to appear and plead, answer, or demur to the bill. Both acknowledged service of the order. This brought them effectually before the court. In McBurney's answer he in-

sisted that Miller, as assignee, and the facts of Ball's bankruptcy, discharge, and death, could be brought into the case only by a supplemental bill. The court thereupon ordered such a bill to be filed for that purpose, and it was filed accordingly. It made Miller alone a defendant. Here it has been insisted that all the other defendants to the amended bill should have been made parties to the supplemental bill also. To this objection it is a sufficient answer that it does not appear to have been taken below. It cannot, therefore, be taken here. Were we to hold otherwise, we should in this respect exercise original instead of appellate jurisdiction. There are other answers equally conclusive, but it is needless to consume time by adverting to them.

It is also objected that William Carson and James Carson, the sons of William Carson, deceased, had only a right of action, and that this right could not be transferred to the complainant. This is an inverted view of the subject. The bill charges fraud, conspiracy, and spoliation. If the charge is untrue, the bill should be dismissed. If otherwise, there is a recoil upon the wrong-doers, and those intended to be despoiled are unaffected. Their rights are just what they would have been if the scheme had been neither conceived nor executed. A different result would be a legal solecism.

All the obstructions are thus removed from our way to the examination of the merits of the case.

The last amended bill is silent as to the sale of the personal property, and the decree relates only to the bonds of Ball for the purchase-money of the plantation and the mortgage securing them upon that property. The decree charges upon the property the amount due on the bonds, and directs the mortgage to be enforced in all respects as if the bonds had not been surrendered and the mortgage had not been cancelled. McBurney and McGhan are the only appellants. Our further remarks will be confined to the subject of the decree.

The executors sold the property to Ball in the spring of 1857 for $50,000. He paid $15,000 down, and gave his bonds for the balance, secured by a mortgage upon the premises, as before stated. The property was valuable, and the amount due was well secured. The debt was payable only in lawful money

of the United States, and the executors had no right to take any thing in payment but such money or its equivalent. Such was the condition of things in the spring of the year 1863.

The civil war was then flagrant in South Carolina. McBurney says, that having a large quantity of cotton on hand, and the city being blockaded, his firm "were willing to change some of their investments into real estate until peace should be restored." This was shrewd and wise. The sole currency there was Confederate money. The Dean Hall property lay invitingly before them, but was incumbered by a heavy mortgage for the benefit of the widow and the orphans. The plan was conceived of acquiring the title and getting rid of the mortgage, both by means of Confederate currency. They thus executed it: They gave Ball $100,000 in Confederate notes for the property, and took a conveyance from him. They placed a part of the Confederate money in his hands, as McBurney says, "to enable him to pay off his bonds to said executors and to satisfy said mortgage." Robertson received payment in this paper and thereupon gave up the bonds, and as soon as he could get access to the record entered satisfaction of the mortgage. He invested the notes in Confederate bonds, which became utterly worthless at the close of the war.

McBurney & Co. and the Carsons thus changed places. The former still hold the broad acres, while the latter have lost every dollar of their investment, so well secured at the outset upon the property. They became, as it were, the insurers of the fate of battles and of the result of war. There was evidently a plot. McBurney & Co. were its contrivers, Ball was their instrument, Robertson was their dupe, and the Carsons were the victims.

If the case stopped here we could not hesitate as to what our judgment should be. But in its strictly legal aspect it is equally free from doubt.

In *Ward* v. *Smith* (7 Wall. 451), this court held that a valid payment could not be made to an agent in the Confederate States during the rebellion in any thing but lawful money of the United States, or bank-notes of the current value of their face, without the consent of the creditor.

In *Horn* v. *Lockart* (17 id. 570), an executor had sold prop-

erty, invested the proceeds in Confederate bonds, and his conduct had been approved and ratified by a decree of the Probate Court. It was held by this court that the investment was void, that the decree of the Probate Court was a nullity, and that the executor was liable to the distributees in good money for the full amount involved.

Fretz v. *Stover* (22 id. 198), in its most prominent features, is not unlike the case before us. There, a citizen of Pennsylvania, just before the breaking out of the war, took the bond of a citizen of Virginia, secured by a deed of trust upon real estate. The attorney of the creditor was the trustee in the deed. During the war the attorney received payment in Confederate notes, and Virginia bank-notes of no greater value, the entire capital of the bank having been converted into Confederate bonds. After the close of the war the creditor sued for his debt. This court adjudged that the transaction between the attorney and the debtor was illegal, fraudulent, and void, and decreed the enforcement of the bond and deed of trust.

The question has been raised whether Robertson acted, touching the bonds and mortgage of Ball, as executor or trustee. The matter is immaterial in this case. An executor guilty of a *devastavit*, whereby assets are diverted from their proper application, and a trustee guilty of a breach of trust, and their accomplices, if they have any, are held liable upon the same principle and to the same extent. *Field* v. *Schrieffelin*, 7 Johns. (N. Y.) Ch. 150; *Hill* v. *Simpson*, 7 Ves. 152.

There can, however, be no doubt upon the point suggested. "Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that though executor he is not clothed with any of those trusts." 3 Williams, Executors, 1796.

Proving the will is an acceptance of the trust. *Mucklow* v. *Fuller*, Jacob, 198. Where a trust is created by a will and no trustee appointed, "the executor is bound to act as such trustee." *Holbrook* v. *Harrington and Others*, 16 Gray (Mass.), 102 In such case the sureties in the bond of the executor are liable for his defaults, whether in one sphere of duty or the other.

Newcomb v. *Williams*, 9 Metc. (Mass.) 525; *Prior* v. *Talbott*, 10 Cush. (Mass.) 1; *Door* v. *Wainright*, 13 Pick. (Mass.) 328, *Towne* v. *Ammidown*, 20 id. 535.

Decree affirmed.

ELLIOTT v. RAILROAD COMPANY.

1. The court reaffirms its ruling in *Erskine* v. *Milwaukee & St. Paul Railroad Co.* (94 U. S. 619), that the forfeiture of $1,000 is the only penalty to which a corporation is liable for default, under sect. 122 of the internal-revenue act of June 30, 1864 (13 Stat. 284), as amended by the act of July 13, 1866 (14 id. 138).
2. No intention to add to the penalty for that default, while the section remained in force, is manifested by the act of July 14, 1870 (16 Stat. 260).
3. Penalties are never extended by implication. Unless expressly imposed, they cannot be enforced.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of trespass on the case by the East Pennsylvania Railroad Company against William B. Elliott, collector of internal revenue for the first district of Pennsylvania. The jury returned a special verdict as follows: —

1. That the plaintiff is a railroad company, incorporated under the laws of the State of Pennsylvania, and having its principal office in the first United States internal-revenue collection district of said State at the date of the returns and payments hereinafter mentioned.

2. That the defendant was, at the date of the said payments, collector of internal revenue of the United States for the said district.

3. That on the eighteenth day of January, 1870, a dividend of $39,276, being three per cent on the capital stock of the said company, became due and payable, and was paid to the stockholders of the said company by the Philadelphia and Reading Railroad Company as rent for the railroad of the said plaintiff, payable for the preceding six months, under the provisions of a lease and contract dated May 19, 1869, whereby the railroad of the said plaintiff was leased to the Philadelphia

and Reading Railroad Company, and the said rent was received and made payable directly by the latter company to the stockholders of the said company plaintiff, without the declaration of any dividend by the directors of the said company plaintiff.

4. That on the fifteenth day of December, 1871, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest), whereby it appeared that a tax of five per cent upon the said dividend ($39,276), with the sum of $2,067.16 (five per cent of a sum of which the said dividend is ninety-five per cent) added thereto, would amount to $2,067.16.

5. That a list containing said return was duly forwarded by the said assessor to the collector of internal revenue for the said district.

6. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $2,067.16 to the said defendant, then collector as aforesaid, together with alleged penalties, amounting to $475.45 (viz. $103.36, five per cent on said tax, and $372.01, interest at the rate of one per cent per month from Jan. 1, 1872, to July 1, 1873), making in all the sum of $2,542.61; that said payment was made under compulsion, and was accompanied by a written protest of the company against its liability therefor.

7. That on the sixteenth day of January, 1872, a dividend of $39,276, being three per cent on the capital stock of the plaintiff, was paid to the holders of the shares of the said capital stock by the Philadelphia and Reading Railroad Company as rent for the preceding six months, under the provisions of the lease above mentioned.

8. That on the tenth day of January, 1872, the said company, in accordance with the requirement of the assessor for the said district, made a return (accompanied by a written protest), whereby it appeared that a tax of two and one-half per cent upon the said dividend ($39,276), with the sum of $1,007.08 (two and one-half per cent of a sum of which the said dividend is ninety-seven and one-half per cent) added thereto, would amount to $1,007.08.

9. That a list containing said return was duly forwarded by

the said assessor to the collector of internal revenue for the said district.

10. That on the twenty-ninth day of July, 1873, the said company paid the said sum of $1,007.08 to the said defendant, then collector as aforesaid, together with the alleged penalties, amounting to $211.48 (viz. $50.35, five per cent on said tax, and $161.13, interest at the rate of one per cent per month from March 1, 1872, to July 1, 1873), making in all the sum of $1,218.56; that said payment was made under compulsion, and was accompanied by a written protest of the company against its liability therefor.

11. That on the twenty-fifth day of September, 1873, the said company duly presented claims to the Commissioner of Internal Revenue of the United States for refunding the said sums of $2,542.61 and $1,218.56.

12. That on the sixth day of February, 1874, the said claims were rejected by the said Commissioner of Internal Revenue of the United States.

Judgment having been entered in favor of the company for "$686.93 (being the penalty of five per cent, and interest thereon at the rate of one per cent per month, as mentioned in said verdict), together with interest thereon from July 29, 1873, $183.64, in all, the sum of $870.57," the collector brought the case here.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith* for the plaintiff in error.

Mr. James E. Gowen, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *Erskine* v. *Milwaukee & St. Paul Railroad Co.* (94 U. S. 619), we decided that the only penalty to which a corporation was liable for default under sect. 122 of the internal-revenue act of June 30, 1864 (13 Stat. 284), as amended July 13, 1866 (14 id. 138), was that of $1,000, specially provided for in that section. We are now asked to review that ruling; but after a careful consideration of the elaborate arguments which have been submitted, we are satisfied that it was right. The language of the section to be construed is as follows: "And for any default in making or rendering such

list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of $1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect and refusal." In that case we were asked to hold that the company, in case of default, was liable for the penalty of five per cent and interest at the rate of one per cent a month, provided for in sect. 119, as amended (13 id. 283; 14 id. 480); but we decided that this provision applied only to cases of default in payment of the duties imposed by that section. The correctness of that ruling is now conceded; but it is claimed that the company is liable for a penalty of five per cent and interest at the rate of one per cent a month, under sect. 28 of the act of June 30, 1864, as amended July 13, 1866 (14 Stat. 106), sect. 11 of the act of July 13, 1866 (id. 150), and sect. 8 of the act of March 2, 1867 (id. 473). The last-named act simply provides that when for a failure to pay a tax at the time and in the manner provided by law a penalty of ten per cent additional upon the amount of the tax so due and unpaid had been exacted, the person or persons so failing or neglecting to pay the tax, instead of paying ten per cent, should pay five per cent and interest at the rate of one per cent a month. The sections of the other acts referred to were evidently intended to apply to taxes and duties included in the regular annual and monthly lists required by law to be made out and placed in the hands of collectors, and not to the taxes on interest and dividends collected through or from the corporations, under the provisions of sect. 122. Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced. Full power is given in sect. 122, by reference to the other provisions of the internal-revenue law, for the collection of the tax and penalty there provided for; but it nowhere appears, by reference or otherwise, that it was the intention of Congress to add to the one penalty which is expressly given for the failure to do what that section requires. As has been said, it is conceded that the addition of five per cent and interest provided

for in sect. 119 applies only to individual incomes. In this connection it is a noticeable fact that although by sect. 8 of the act of March 2, 1867 (14 Stat. 478), a reduction was made from ten per cent to five per cent and interest at the rate of one per cent a month in all cases where a penalty of ten per cent had been imposed for any failure to pay any internal-revenue tax, it was deemed necessary in sect. 13 of the same act (id. 480) to amend sect. 119 specially, so as to reduce in the same way the additional percentage of ten per cent imposed by that section. If it had been supposed that the penalties prescribed in the other parts of the act for failure to pay taxes applied to taxes upon incomes, this special amendment would not have been necessary. But if they did not apply to sect. 119, it is difficult to see how they can to sect. 122. As it was supposed to be necessary to make express provision in sect. 119 for the payment of this additional percentage in order to charge the tax-payer, and it was omitted in sect. 122, the conclusion is irresistible, that it was the intention of Congress to impose no other penalty for a failure to comply with the requirements of this section than the one which is specifically given.

We see nothing in the act of July 14, 1870 (16 Stat. 260), under which a portion of the taxes paid by the defendant in error was assessed, to manifest any intention on the part of Congress to add to the penalties imposed by sect. 122 while that section was in force. The penalty of $1,000 is confined to a default in making the required return, instead of default in making the return or in making the payment, as it was in sect. 122. In other respects the provisions as to penalties in the two acts are substantially the same.

Judgment affirmed.

PENCE v. LANGDON.

1. The jury should not be instructed to find for the defendant, unless the evidence is such as to leave no doubt that it is their duty to return a verdict in his favor.
2. The notice of the rescission of a contract is not rendered void by reason of the fact that it was given in Nevada on Sunday.
3. The vendee of stock in a company, who, on the ground of fraud, rescinded his contract of purchase, is not bound to receive the stock certificate left on deposit for him by the vendor, and tender it to the latter before bringing his action for the purchase-money.
4. The court submitted to the jury to determine whether from certain letters and telegrams, when considered in connection with the other evidence in the case, the defendant undertook to act as the agent of the plaintiff in the purchase of stock from other parties. The jury found, and the letters clearly showed, that he did undertake so to act. *Held*, that the omission of the court to construe the written evidence, if erroneous, affords him no just cause of complaint.
5. Where the plaintiff's knowledge of the fraud and his neglect to promptly rescind the contract are relied on to defeat the action, the burden of proving the fact of such knowledge and the time when it was acquired rests upon the defendant.

ERROR to the Circuit Court of the United States for the District of Minnesota.

The facts are stated in the opinion of the court.

Mr. C. K. Davis for the plaintiff in error.

Mr. William Lochren, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

A brief statement of the facts disclosed in the record will be sufficient for the purposes of this opinion, and a few remarks will suffice to dispose of the case.

Langdon lived in Minnesota. Pence lived in California, and was engaged in mining operations. On the 10th of December, 1874, Langdon, by a letter of that date, advised Pence that he had seen Watson, and inquired about their mining interests. He concluded by saying: "If any thing can be done that will be satisfactory to all parties, let me know." Pence replied by letter of the 17th of that month. Speaking of the mine in which he and Watson were concerned, he said, amongst other

things: "There is an eighth, that is, 7,500 shares, that can be bought if taken at once, at the same I paid and the same Watson paid, after looking and prospecting for five weeks." "The price is . . . $8,368.75, gold." . . . "Should you conclude to buy, you must telegraph me here on receipt of this letter. You can pay," &c. "This will put you on the ground-floor with us, or better than I am, as I have spent about $600 to find this mine, prospect it, and have title looked up, &c. Our title is O. K." Langdon bought and paid the price demanded. On the 28th of January, 1875, Pence addressed Langdon another letter from San Francisco, in which he said: "There have been not less than ½ doz. after the 7,500 *shares of stock I sold you*, and all were astonished to find themselves too late; and still more astonished when I told them there was no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best." . . . "The stock I have deposited in the Nat. Gold Bank and Trust Co. of this city." . . . "I would like to have you come out after the roads get good and weather pleasant in the spring." This letter enclosed a bill commencing "Hon. R. B. Langdon, Mina., to J. W. Pence, dr." The stock was charged and the amount paid was credited. No person other than Pence was named as the seller. Linton and Shepherd were interested with Langdon in the purchase. On the 20th of June, 1875, all of them visited the mine with Pence. They claimed then to have learned for the first time that Pence had sold them his own stock, and to have learned also that the stock was worth much less than they had paid for it. They arrived on Saturday, and on the next day notified Pence that they rescinded the contract, and required what they had paid to be refunded. Shepherd and Linton transferred their interest to Langdon, and he thereupon brought this suit. The code of Minnesota authorized it to be in his name.

Upon the trial in the court below six exceptions were taken by Pence. Two of them were to the admission of testimony. Both of them are so clearly without merit, that we deem it unnecessary to say more about them. He also excepted to the refusal of the court to direct the jury to find a verdict in his favor.

Such direction can be properly given only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. This case was certainly not within that category.

The objection that the notice of rescission was void because given on Sunday is without force. It was given at the mine, which is in Nevada. The result claimed could be produced only by a statutory provision to that effect. The statute of Nevada relating to the Sabbath in no wise affects the subject. See "An Act for the better observance of the Lord's day," of Nov. 1, 1861, 1 Compiled Laws of Nevada, p. 2, c. 8.

The stock certificate left at the Gold Bank for Langdon was never in his possession. The affirmance of this judgment will extinguish his claim to it, and Pence can reclaim it whenever he may choose to do so. Langdon was not bound to receive it and tender it back to Pence before bringing suit.

The remaining exceptions relate to instructions given to the jury, which are as follows:—

"1. In deciding this question of fact, you must take the letters and telegrams and all of them, and looking at them in the light of the previous relations of the parties, and of what each of the writers knew, placing yourselves in the writers' place and situation in order better to ascertain their meaning and purpose, and in the light shed upon this question of fact by these letters and telegrams, and by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of the stock from others."

Admitting that the court was wrong in not giving a construction to the letters one way or the other, touching the main point in the controversy, as is insisted, a concession, perhaps, not necessary to be made, it cannot avail the plaintiff in error that it was not done. Properly construed, we think the letters show clearly the agency of Pence as claimed by Langdon. The jury found accordingly. No harm was, therefore, done by the omission of the court; and if it were erroneous, the error is one of which Pence certainly has no right to complain. With respect to the duty of the court as to construing the let-

ters, see *Etting* v. *The Bank of the United States*, 11 Wheat. 59; *Barreda* v. *Silsbee*, 21 How. 146.

"2. It was not enough to charge the plaintiff with knowledge of the mal-character of the transaction, that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used, rather than put upon them a construction which would show bad faith on the part of the defendant, which he had no reason to anticipate."

This, under the circumstances, we think, was exactly right.

"3. Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practised upon him. It is not enough to show that he might have known or suspected it from data within his reach."

The preceding remark is applicable also to this instruction.

"4. If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

There can be no doubt as to the soundness of this proposition.

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable despatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. But the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by

which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive.

The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.

Here Langdon was lulled into security by his relations to Pence, and by Pence's letters.

There is no proof that he had the slightest knowledge or even suspicion of any foul play until he visited the mine. His action then was prompt and decided.

The instructions of the court as to the law upon the subject were clear, accurate, and well expressed. The rest was for the jury. With what they did we have nothing to do.

We find no error in the record.

Judgment affirmed.

UNITED STATES v. COUNTY OF MACON.

1 Where the statute authorizing a county to subscribe for stock in a railroad company, and issue its bonds therefor, limits its power to provide for the payment of them to an annual special tax of one-twentieth of one per cent, and other laws then and still in force empowered it to levy a tax for general purposes not exceeding one-half of one per cent, upon the assessed value of the taxable property of the county, — *Held*, that, in the absence of further legislation, a *mandamus* will not lie to compel the levy of taxes beyond the amount so authorized.

2. A holder of such bonds who has recovered judgment for the amount thereof does not thereby obtain an increased right to a levy of taxes.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The United States, on the relation of Alfred Huidekoper, filed, on the eighth day of May, 1875, a petition for a *mandamus* against the county court of Macon County, Missouri. The case exhibited by the pleadings is this: the relator, Nov. 25, 1874, recovered in the court below against said county a judgment upon interest coupons detached from bonds issued by it under and by authority of an act of the General Assembly of said State, entitled "An Act, to incorporate the Mississippi and Missouri Railroad Company," approved Feb. 20, 1865.

He alleges that the company received the bonds, which are negotiable in form and payable in New York, in satisfaction of the county's subscription to its capital stock, and delivered the requisite stock certificates to the county; that the latter has ever since retained them and exercised the right of a stockholder in the company, and has levied and collected taxes at the rate of one-half of one per cent to pay the interest on the bonds, and has paid the first four instalments thereof; that an execution was sued out on the judgment, and returned *nulla bona;* that he then made a demand of the county court to levy and collect a tax for the purpose of paying the judgment, with which demand it has refused and neglected to comply. The county court, in its return to the alternative *mandamus* awarded, admits the rendition of the judgment, and alleges that the act incorporating the company provides, by its thirteenth section, that "it shall be lawful for the corporate authority of any city or town, or the county court of any county, desiring to do so to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same not exceeding one-twentieth of one per cent upon the assessed value of the taxable property for each year;" that under the authority so conferred the county court subscribed, April 2, 1867, for $175,000, and April 12, 1870, for another $175,000, of stock in the company, and issued its bonds in payment of each subscription; that the judgment rendered in favor of the relator was on interest coupons detached from a portion of the bonds issued in payment of the last subscription; that all of said bonds, with the interest thereon, are still outstanding and unpaid; that both subscriptions were made without the assent of two-thirds of the qualified electors of said county, no regular or special election having been held to procure such assent; that the tax of one twentieth of one per cent on the assessed value of all the taxable property of and in Macon County has been annually levied for the years between 1867 and 1875, inclusive, but is not sufficient to pay the interest annually accruing on the bonds issued in payment and satisfaction of said first subscription; that the county has neither money nor property with which to pay them or the interest thereon, and the county court has no authority, under any law of the State, to levy for that purpose a tax other

than the said one-twentieth of one per cent; that it is ready to continue to levy it, and apply the same as far as it will go in payment and satisfaction of the principal and interest of said bonds issued in payment of said first subscription, unless otherwise ordered by a court of competent jurisdiction; and that there is and was no other consideration for said bonds from which were detached the interest coupons sued on by the relator than the payment and satisfaction of said second subscription.

The county court prays judgment whether the levy of the tax of one-twentieth of one per cent and the collection and appropriation thereof *pro rata* to the payment of the bonds and interest thereon, issued in payment and satisfaction of said first subscription, are not a full discharge of its duty in the premises until the tax thus levied, collected, and appropriated shall have fully paid said bonds and interest, and that the residue of said tax shall be applied *pro rata* in payment of the principal and interest of the bonds issued in payment and satisfaction of the second subscription.

The relator demurred to the return. The demurrer was overruled and the proceeding dismissed.

The judges were opposed in opinion upon the following questions, and the requisite certificate was filed and made a part of the record: —

First, Whether the provision in the thirteenth section of the act of the General Assembly of the State of Missouri, entitled "An Act to incorporate the Missouri and Mississippi Railroad Company," approved Feb. 20, 1865, recited in the bonds, writ, and return in respect of the levy of taxes to pay the bonds, was intended only to provide a sinking-fund for the eventual payment of the principal of the bonds, leaving the county court power to provide for the payment of the interest thereon under the then existing general statutes of the State or by implication, or whether the said provision in said act is an absolute and existing limitation on the power of the said county court in respect to both the principal and interest.

Second, Whether the said limitation in the said thirteenth section of the said act, if it existed when said act was passed, was removed, or the power to levy taxes enlarged, by the sub-

sequent legislation of the State, so as to give the respondent power to levy such an amount and rate of tax from year to year as might be necessary to pay the interest on the said bonds.

Third, Whether the said limitation in said thirteenth section applies to the case of a creditor who has recovered judgment on coupons on said bonds, and whose execution has been returned *nulla bona*.

Fourth, Whether the relator, a judgment creditor, is entitled only to his proportion of the levy of one-twentieth of one per cent, said proportion to be ascertained by the ratio which his bonds bear in amount to the whole bonded debt, or whether he, by reason of his judgment, is entitled to priority of payment over the bondholder who has obtained no judgment?

Fifth, Whether the judgment creditors, upon bonds issued in payment of the second subscription, are on an equal footing with creditors who recovered judgment on the bonds issued in payment of the first subscription?

The plaintiff sued out this writ, and assigns for error that the demurrer should have been sustained, and a peremptory *mandamus* awarded.

Mr. Joseph Shippen for the plaintiff in error.

The special tax authorized by sect. 18 of the act of 1865 was intended to provide for the payment of the principal of the bonds by creating a sinking-fund for their gradual extinction. It had no reference or application to current interest. This interpretation is in harmony with *United States* v. *County of Clark* (96 U. S. 211), and does not conflict with the points actually presented of record and decided by the Supreme Court of Missouri in *State ex rel. Aull* v. *Shortridge* (56 Mo. 126), because that case involved not simply the interest, but chiefly the principal debt itself.

The intention in chartering the company, and authorizing counties to subscribe for the stock thereof, was that their subscriptions and the bonds to be issued therefor should be of an amount to render substantial aid.

Such was the construction given in 1870 and prior: By the Supreme Court, compelling the first issue of bonds to be made

(*State ex rel. Missouri & Mississippi Railroad Co.* v. *Macon County Court*, 41 Mo. 453); by the county court, in making its two subscriptions and issues, and subsequently for years levying a tax of one-half of one per cent, adequate to pay the interest and part of the principal thereof; by the company, which, on receiving the bonds at par, issued $350,000 of its stock therefor to the county; and by the purchasers of the bonds.

The carrying into effect of the doctrine that the act created a special trust fund consisting of said one-twentieth of one per cent, on which alone all bondholders must depend for payment of interest and principal, would subvert the intention of the contracting parties, and work manifest injustice. From that doctrine it follows: 1. That the Supreme Court of Missouri, by its peremptory mandate, compelled the county court to issue $175,000 of bonds in 1867, when the said tax would have paid only one and a half per cent interest per annum on said bonds, without any provision for ever paying the principal. *State ex rel., &c.* v. *Macon County Court*, *supra*. 2. That the county could legally issue its bonds *ad voluntatem, ad infinitum usque*, but could legally pay thereon only what said tax might yield. 3. That the bonds were of uncertain and contingent payment, and hence, irrespective of their amount, non-negotiable securities, worthless for the public purposes for which they were issued. 4. That the legal liabilities of the county are destined never to be extinguished, but must demonstrably in time, by the accumulation and compounding of interest, far exceed in amount the whole taxable property. 5. That the county, while paying less than one-tenth of the interest on its valid indebtedness, retains the $350,000 of stock received in consideration thereof, and will devote all taxes derived from the property of the company to the education of the young. 1 Wagner, Statutes, 814, sect. 55. 6. That a *pro rata* share of such trust fund is all to which any creditor desiring payment is entitled, although there is no provision of law to secure to him even such a participation therein. 7. That the litigation between the county and its creditors for the distribution of such special trust fund is destined to be perpetual.

In construing a statute, reference must be had to the object to be attained and the means to be employed. It will not be

presumed that the legislature attempted to authorize a proceeding unreasonable in itself. *Neenan* v. *Smith*, 50 Mo. 528; Sedgwick, Stat. & Const. Law, 235; *Milner* v. *Pensacola*, 2 Woods, 633; *McCracken* v. *City of San Francisco*, 16 Cal. 591.

Although these bonds have been adjudicated by both the State and the Federal courts to be valid obligations, no notice, either in fact or in law, was given to the purchaser that they were not to be absolutely and unconditionally paid according to their tenor. There was nothing on their face to give warning that there was an over-issue of them, and an innocent holder should not be called upon to ascertain how many may have been put upon the market, so long as there is a law authorizing the issue of a bond such as he takes. The amount of them or of the interest that an annual tax of one-twentieth of one per cent would pay was not capable of ascertainment at the time of the subscription or thereafter; and he was not required by law, or the decisions of this court, to investigate the ratio existing between the debt they represented and the tax assessments. *Contra*, the county court had the fullest knowledge and control of all these matters, and in favor of a *bona fide* purchaser of its securities is presumed to have acted through its duly elected and sworn officers within the prescribed limits. *Omnia præsumuntur solenniter esse acta.* Broom's Legal Maxims, 729; *State ex rel. Neal* v. *Saline County*, 48 Mo. 390; *Pendleton County* v. *Amy*, 13 Wall. 297; Dillon, Municipal Corporations, sect. 419; *Town of Venice* v. *Murdock*, 92 U. S. 494, 499; *Marcy* v. *Oswego Township*, id. 637; *Humboldt Township* v. *Long*, id. 642; *Town of Coloma* v. *Eaves*, id. 484; *Ranger* v. *New Orleans*, 2 Woods, 128.

If he had made such an investigation, it could not have afforded him the slightest protection for the future, and the estoppel created in his favor by the facts admitted of record in this case protects him not only in recovering a judgment, but also in enforcing its payment.

Adequate power to provide by taxation for the payment of interest upon the bonds in question was conferred by the general statutes in existence at the time of granting the charter of the company.

The Revised Statutes of Missouri of 1855, p. 438, provide:—

"SECT. 34. Any county court or city which has heretofore subscribed to the capital stock of any railroad in this State shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities by this act, and may levy a special tax to pay the interest on their bonds, or to provide a sinking-fund to pay the principal."

"SECT. 57. All existing railroad corporations within this State, and such as now or may be hereafter chartered, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter contained in this act."

These provisions, in substance, were re-enacted in the general statutes which went into effect Aug. 1, 1866, and are still in force (1 Wagner, Statutes, 305, 306, 312); and ample power to tax is clearly included among the powers and privileges conferred by sect. 57. *Smith* v. *Clark County*, 54 Mo. 58; *Scotland County* v. *Thomas*, 94 U. S. 682. The Supreme Court of Missouri has expressly held that, were it not for the supposed limitation in the charter, these statutes conferred the power the exercise of which the relator demands. *State ex rel. Aull* v. *Shortridge*, *supra*. They are consistent with the charter, and a repeal by implication cannot, therefore, be admitted. *City of Galena* v. *Amy*, 5 Wall. 705; *McCool* v. *Smith*, 1 Black, 470; *City of St. Louis* v. *Alexander*, 23 Mo. 483.

Said sect. 13 has no application to Huidekoper, who in his suit against the county recovered a *general* judgment, although it was based upon coupons from bonds issued under the authority of said section. *United States* v. *County of Clark*, 96 U. S. 211, 216. Had it been payable only out of the special tax, this position would be untenable.

The defendant is concluded by the judgment. *Supervisors* v. *United States*, 4 Wall. 435; *The Mayor* v. *Lord*, 9 id. 409. If the county had subscribed on behalf of a township, the judgment would have been rendered with an express provision that it should be payable only by taxes levied within the town-

ship. *Cass County* v. *Johnston*, 95 U. S. 360; *Jordan* v. *Cass County*, 3 Dill. 185. In these cases the judgments were against the county as "trustee of the township." A judgment is rendered against executors payable *de bonis testatoris;* and against trustees payable from trust funds *quando*. It was, in this case, absolute and unconditional in favor of the relator. Had he been limited to any specific fund or revenue, as a means of payment, the judgment would have so declared. The execution, which was returned *nulla bona*, was general, and so should be the *mandamus*.

"When judgment is obtained, and there is no property subject to execution out of which it can be made, *mandamus* will lie, and is the proper remedy to compel the levy and collection of the necessary taxes to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect; and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*." Dillon, Mun. Corp., sect. 686, and the authorities there cited.

Mr. Willard P. Hall and *Mr. James Carr* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In *United States* v. *County of Clark* (96 U. S. 211), we decided that bonds issued by counties under sect. 13 of the act to incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax authorized by that section the holders were entitled to payment out of the general funds of the county. In *Loan Company* v. *Topeka* (20 Wall. 660), we also decided that "it is to be inferred, when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

When the act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties in the

State of Missouri to tax for general purposes was limited by law to one-half of one per cent on the taxable value of the property in the county. Rev. Stat. Mo., 1865, p. 96, sect. 7, p. 121, sect. 76. This limit has never since been increased, and the Constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class of Macon. Art. 10, sect. 11. If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent, and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius.*

Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the

obligation of a debtor who is unable to provide the means of payment. We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order.

Our attention has been directed to the general railroad law in force when the Missouri and Mississippi Railroad Company was incorporated and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two-thirds of the qualified voters of the county. Under such circumstances, it seems to have been considered proper to allow substantially unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent was required, and the tax-payers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The general railroad act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bondholders claim under the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed.

We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment.

This disposes of the case, and without answering specifically the questions that have been certified, we affirm the judgment.

Judgment affirmed.

NOTE. — In *County of Macon* v. *Huidekoper*, error to the Circuit Court of the United States for the Western District of Missouri, which was argued at the same time and by the same counsel as was the preceding case, MR. CHIEF JUSTICE WAITE announced the judgment of the court, as follows: A majority of the court adheres to the decision in *United States* v. *County of Clark* (96 U. S. 211), and I am directed to announce the affirmance of this judgment upon the authority of that case.

TERHUNE v. PHILLIPS.

The court will take judicial notice of a thing which is in the common knowledge and use of the people through the country. It therefore holds that reissued letters-patent No. 5748, granted to Matthias Terhune Jan. 27, 1874, for an alleged new and useful improvement in corner sockets for show-cases, are void for want of novelty.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity by Matthias Terhune against John Phillips and Wellington Phillips, praying for an injunction restraining them from using or vending, or in any manner putting into practical operation or use, the corner sockets for show-cases for an improvement in which reissued letters-patent No. 5748 had been granted to the complainant by the United States, Jan. 27, 1874.

It appears by the specification forming a part of the letters-patent that the invention for which they were granted "has for its object to provide a means for connecting the ends of the horizontal and vertical members of a show-case frame; and to that end it consists in a metallic corner-piece, provided with sockets adapted to receive the ends of the different members, whereby the same are firmly connected at the corners of the case."

The court below dismissed the bill, whereupon the complainant brought the case here.

Mr. L. L. Coburn for the appellant.

No counsel appeared for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The determination of this case is controlled by *Brown et al.* v. *Piper*, 91 U. S. 37. We cannot fail to take judicial notice that the thing patented was known and in general use long before the issuing of the patent. The substitution of metal for wood was destitute both of patentable invention and utility. The admission of improper testimony, if it occurred, was, therefore, immaterial. The case of the appellant as it appears in the record, without any testimony, is clear and conclusive against him.

Decree affirmed.

ALVORD *v.* UNITED STATES.

1. The court announces its determination to enforce rigidly the rules requiring causes to be ready for hearing when they are reached.
2. Counsel who enter their appearance under the requirements of Rule 9 will be held responsible for all that such an entry implies, until, by substitution or otherwise, they are relieved from the obligation they have assumed.

ERROR to the Supreme Court of the Territory of Idaho.

Motion to reinstate cause dismissed under Rule 16.

Mr. J. W. Denver in support of the motion.

MR. CHIEF JUSTICE WAITE announced the judgment of the court.

This application comes directly within the rule laid down in *Hurley* v. *Jones*, 97 U. S. 318. As we took occasion to say in that case, "our rules requiring causes to be ready for hearing when reached are and will continue to be rigidly enforced." We recognize no *pro forma* attorneys of record. Counsel who enter their appearance under the requirements of Rule 9 must understand that the court will hold them responsible for all that such an entry implies until they relieve themselves from the obligation they assume, by substitution or otherwise.

Motion denied.

WHISKEY CASES.

UNITED STATES *v.* FORD; UNITED STATES *v.* FORD; UNITED STATES *v.* ONE STILL; UNITED STATES *v.* FIFTY BARRELS OF DISTILLED SPIRITS; UNITED STATES *v.* THREE HUNDRED AND NINETEEN BARRELS OF WHISKEY; UNITED STATES *v.* FOUR HUNDRED BARRELS OF DISTILLED SPIRITS; UNITED STATES *v.* FOUR HUNDRED PACKAGES OF DISTILLED SPIRITS; UNITED STATES *v.* ONE HUNDRED AND FIFTY BARRELS OF WHISKEY.

1. The district attorney has no authority to contract that a person accused of an offence against the United States shall not be prosecuted or his property subjected to condemnation therefor, if, when examined as a witness against his accomplices, he discloses fully and fairly his and their guilt.
2. A person so accused cannot plead the contract in bar of proceedings against him or his property, nor avail himself of it upon the trial, but has merely an equitable title to executive mercy, of which the court can take notice only when an application to postpone the case is made in order to give him an opportunity to apply to the pardoning power.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The first two of these cases were actions of debt instituted in the Circuit Court to recover the penalties imposed by sects. 3296 and 3452 of the Revised Statutes. The remaining cases were instituted in the District Court by way of information under sects. 3281, 3299, 3453, and 3456. The defence in the first case, and it is substantially the same in all, consists of the general issue and the following special plea: —

"And for a further plea in this behalf said defendants say *actio non*, because they say that heretofore, to wit, on the twenty-seventh day of December, A.D. 1875, at Chicago, at, to wit, said northern district of Illinois, the said plaintiffs and the said defendants entered into an agreement by which it was, among other things, agreed that if the said defendants would testify on behalf of the plaintiffs frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the revenue service and other parties, then known to exist, whereby the honest manufacture of spirits and

payment of the tax had been rendered practically impossible, and should plead guilty to one count in an indictment then pending against them in the District Court, in and for said northern district, and should withdraw their pleas in a certain condemnation case then pending against them in said District Court, the said plaintiffs would recall any and all assessments under the internal-revenue laws then made against said defendants, and that no more assessments under said law should be made against said defendants, and that no proceedings other than said condemnation case should be prosecuted against said defendants, and that no new proceedings should be commenced against said defendants on account of transactions then past; and these defendants aver that they and each of them have fully performed said contract on their part, and defendants further aver that this suit is a proceeding other than said condemnation case, and that this suit is for the recovery upon transactions prior to the entering into said agreement; and this the said defendants are ready to verify."

The United States demurred to the special plea. The demurrer was overruled, and judgment having been rendered for the defendants, and the judgment of the District Court affirmed. the United States brought the cases here.

The Attorney-General for the United States.
Mr. Edward Jussen and *Mr. Charles H. Reed, contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offence, provided it appears that he acted in good faith and that he testified fully and fairly.

Where the case is not within any statute, the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offence disclosed; but it is equally clear that he cannot by law plead such facts in bar of any indictment against him, nor avail

himself of it upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose. *Rex* v. *Rudd*, 1 Cowp. 331.

Sufficient appears to show that the following are the material proceedings in the several cases: 1. That the first two were actions of debt commenced in the Circuit Court to recover the double internal-revenue tax imposed, as fully set forth in the respective declarations. 2. That the other six cases are informations filed in the District Court to forfeit the properties therein described for acts done in violation of the internal-revenue laws.

Service was made in the first two cases, and the defendants appeared and pleaded the general issue and the special plea set forth in the transcript. Issue was joined upon the first plea, and the United States demurred to the special plea. Hearing was had, and the court overruled the demurrer and gave judgment for the defendants. Like defences in the form of answers or pleas were filed in the other six cases commenced in the District Court, to which the United States demurred; but the District Court overruled the demurrers, and finally rendered judgment in each case for the defendants. Prompt steps were taken by the district attorney to remove the cases into the Circuit Court, where the respective judgments rendered by the District Court were affirmed.

Suffice it to say in this connection, without entering into detail, that the United States sued out a writ of error in each case and removed the same into this court. Both parties agree that the questions presented for decision are the same in each case, in which the court here fully concurs.

Two errors are assigned as causes for reversing the judgment, which present very clearly the matters in controversy as discussed at the bar. 1. That the plea or answer set up as defence is bad because it is too general and does not set forth the supposed agreement in traversable form. When filed, the first assignment of error also objected to the plea or answer that it did not designate the officer who made the alleged agreement,

which was plainly a valid objection to it; but that was obviated at the argument, it being conceded by the United States that the plea or answer should be understood as alleging that the supposed agreement was made by the district attorney. 2. That the plea or answer is bad because the officer representing the government in these prosecutions had no authority to make the agreement pleaded, and that the court cannot enforce it, as it is void.

As amended, it requires no argument to show that the plea or answer cannot be understood as alleging that the President was a party to any such agreement, as the distinct allegation is that it was made by the district attorney; nor could any such implication have arisen even if the pleading had not been amended, as it is settled law that suits of the kind to recover municipal forfeitures must be prosecuted in the subordinate courts by the district attorney, and in this court, when brought here by appeal or writ of error, by the Attorney-General. *Confiscation Cases*, 7 Wall. 454. Suppose the plea to be amended as stipulated at the argument, the first question is, whether as amended it sets up a good defence to the several actions. Taken in that view, it alleges in substance and effect that the district attorney promised the defendants that if they would testify in behalf of the United States frankly and truthfully when required, in reference to a conspiracy among certain government officials in the internal-revenue service, and other parties then known to exist, whereby the honest manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and would plead guilty to one count in an indictment then pending against them in said District Court, and would withdraw their pleas in certain condemnation cases then pending against their property in said District Court, for the purpose *only* of insuring their good faith in so testifying on behalf of the United States, then the United States would recall any and all assessments under the internal-revenue law made against them, and that no more assessments under said law should be made against them, that no more proceedings against them should be commenced on account of violations of the internal-revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered

against them or their property, that all suits for penalties and for forfeitures then pending against them and their property should be dismissed, and that full and complete indemnity should be granted to them as the said claimants.

Complete performance on their part is alleged by the claimants, and they allege that the pending suits are for the condemnation and confiscation of their property, which was seized by the United States on the ground of the alleged violation of the internal-revenue law, prior to entering into the said agreement. Assessments made against the claimants or their property are to be recalled, and they and their property are to be free of internal-revenue taxation. Proceedings pending against them for violations of the internal-revenue laws are to be dismissed and no more are to be instituted, and the claimants are promised full and complete indemnity, civil and criminal, if they will consent to testify.

Considering the scope and comprehensive character of the supposed agreement, it is not strange that the district attorney deemed it proper to demur to the plea. He took two objections to it; but the court will examine the second one first, as if that is sustained, the other will become immaterial.

Waiving for the present the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal-revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offence; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defence to the criminal charge in case of a subsequent prosecution.

Considered in its full scope, the agreement is that in consideration of the defendants testifying against their co-conspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but from all penalties and forfeitures they had incurred, and from liability for their internal-revenue taxes

which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, for all their fraudulent and illegal acts in respect to the public revenue.

Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offence, and some of the decided cases and standard text-writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolete practice called *approvement*, which may be briefly explained as follows: When a person indicted of treason or felony was arraigned, he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such *approvement* was only allowed in capital offences, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the *approver*, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the *approver* should be condemned. 4 Bla. Com. 330.

Speaking upon that subject, Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: *First*, in the case of *approvement*, which, as he stated, then still remained a part of the common law, though he admitted it had grown into disuse by long discontinuance. *Secondly*, by discovering two or more offenders, as required in the two acts of Parliament to which he referred. *Thirdly*, persons embraced in some royal proclamation, as authorized by an act of Parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

Approvers, as well as those who disclosed two or more accomplices in guilt and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations

there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled *of right* to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained even at that date only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of *approvement*, modified and modelled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that if he behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior; for if he acts in bad faith, or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Rex* v. *Rudd*, 1 Cowp. 331; s. c. 1 Leach, 115.

Great inconvenience arose from the practice of *approvement*, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawk. P. C. n. 3, p. 532; 3 Russ. on Crimes (9th Am. ed.), 596.

In the present practice, says Mr. Starkie, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and

practice of the court is to stay the prosecution against them and they have an equitable title to a recommendation to the king's mercy. 2 Stark. Evid. (4th Am. ed.) 15.

Participes criminis in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy; but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe, Cr. Evid. (9th Am. ed.) 597.

Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte William Wells*, 18 How. 307.

Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar of an indictment against him for the offence, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon.

Three-quarters of a century before that, ten of the twelve judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial, that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party

time to apply for a pardon. *Rex* v. *Rudd*, 1 Leach, 125; 1 Chitty, Cr. L. (ed. 1847) 82; Mass. Cr. L. 175.

Attempt was made sixty years later in the same court to convince the judges then presiding that some of the remarks of the Chief Justice in *Rex* v. *Rugg*, before cited, justified the conclusion that the accomplice in such a case was by law entitled to be exempted from punishment; but Lord Denman replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defence to an indictment or an answer to the question why sentence should not be pronounced, saying, in substance and effect, that the right mentioned was only an equitable right, and that the court would postpone the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the crown for mercy. *Rex* v. *Garside & Mosley*, 2 Ad. & Ell. 275; *Rex* v. *Lee*, Russ. & R. 361; *Rex* v. *Hunton*, id. 454.

Other text-writers of the highest repute, besides those previously mentioned, affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon, that they have only an equitable right to a recommendation to the executive clemency; and they all hold that prisoners under such circumstances cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defence on their trial.

None of those propositions can be successfully controverted; but it is equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the executive. 3 Russ. Crimes (9th Am. ed.), 597.

Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith, and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillipps in his valuable treatise on Evidence; but he, like the

preceding text-writer, states that accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify, that such an equitable title cannot be pleaded in bar nor in any manner be set up as a defence to an indictment charging them with the same offence, though it may be made the ground of a motion for putting off their trial in order to allow time for an application to the pardoning power. 1 Phil. Evid. (ed. 1868) 86.

Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. Id. 87; 3 Russ. Crimes (9th Am. ed.), 598.

Good reasons exist to suppose that the same course is pursued in the courts of some of the States, where the English practice seems to have been adopted without much modification. *People* v. *Whipple*, 9 Cow. (N. Y.) 707.

Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the States is quite different from that just described, the rule being that the court will not advise the Attorney-General how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State.

Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make

to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may *nol. pros.* the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. 1 Bish. Cr. Proc. (2d ed.), sect. 1076, and n.

Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision.

Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of *approvement*, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin,

to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith, and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations. *Commonwealth* v. *Knapp*, 10 Pick. (Mass.) 477. Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession.

Nothing of weight by the way of judicial authority can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People* v. *Whipple*, *supra*; *United States* v. *Lee*, 4 McLean, 108.

Neither of those cases, however, support the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the governor, and the authority of the court extended no further than the recommendation for mercy; to which the court responded, that the legal presumption was that the public faith will be preserved inviolate, and that the equitable claim of the party will be ratified and allowed.

Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out; and the court proceeded to remark, that if the district attorney failed to enter a *nolle prosequi* to the indictment, "the court will continue the cause until an application can be made for a pardon," which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of *approvement*. More evil than good flowed from that regu-

lation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the executive, which, as Lord Mansfield said, rests on usage and the good behavior of the accomplice, who in a proper case will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled.

Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a Federal court will not be sacredly accorded to him by the President, in whom the pardoning power is vested by the Federal Constitution.

Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the Circuit Court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court.

Tested by these considerations, it is clear that the Circuit Court also erred in affirming the judgment of the District Court in all the other cases, and that the judgment in each of those cases must be reversed, and the causes remanded with directions to reverse the judgment of the District Court, and for further proceedings in conformity with the opinion of the court; and it is

So ordered.

WHITNEY v. COOK.

1. Under amended Rule 6 the plaintiff in error, or the appellant, may, with a motion to dismiss the writ of error or the appeal, unite a motion to affirm the judgment or the decree; but where there is no color of right to a dismissal, the case being clearly within the jurisdiction of this court, a motion to affirm merely will not be sustained.
2. The court declares that 't will by the assessment of damages suppress the evil of resorting to its jurisdiction upon frivolous grounds.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

Motion to affirm the judgment of the court below.

Mr. Philip Phillips in support of the motion.

Mr. Thomas J. Durant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a motion to affirm only. Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion. Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked.

NATIONAL BANK v. BANK OF COMMERCE.

Where a judgment was rendered October 5, and the present term commenced October 15, and the writ of error and citation were returnable on the "second Monday in October next," the court, March 17, grants, on motion of the plaintiff in error, an order allowing the writ to be amended by inserting the third Monday of the term as the return-day thereof, but requires him to cause a new citation returnable on the first Monday of the following May to be issued and served.

MOTION to amend a writ of error to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Philip Phillips in support of the motion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The judgment below was rendered Oct. 5, 1878, and the present term of this court commenced October 15. A writ of error returnable on the "second Monday in October next" was sued out and served the day the judgment was rendered. A citation returnable on the same day with the writ was duly signed and served before the first day of the term.

Rule 8 of this court provides that in cases when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day. By sect. 1005 of the Revised Statutes this court is authorized at any time, in its discretion and upon such terms as it may deem just, to allow an amendment of a writ of error when it is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error. Sect. 999, Rev. Stat., provides that the adverse party shall have at least thirty days' notice of a writ of error by citation.

The plaintiff in error now moves to amend the writ so as to make the return-day the first day, or the third Monday of the present term; for the issue of a new citation to conform

to the amended writ, and for leave to file the transcript and docket the cause.

We think the motion should be granted. Sect. 1005 clearly authorizes us, in our discretion, to allow the amendment of the writ, and we cannot see that the defect has prejudiced, or that the amendment will injure, the defendant in error. The fact that thirty days could not elapse between the date of the writ and the return-day presents no objection. Sect. 999 of the Revised Statutes is but the re-enactment of a similar provision in sect. 22 of the Judiciary Act of 1789 (1 Stat. 84), and until the promulgation of the present rule at the December Term, 1867 (6 Wall. vi.), all writs of error were made returnable on the first day of the term next after their date, no matter how short the time between the day of the issue and that of the return. The citation followed the writ, and service was required before the return-day. By a rule entered as early as the February Term, 1803, if the writ issued within thirty days before the meeting of the court, the defendant in error was at liberty to enter his appearance and proceed to trial, or otherwise the cause was continued. 1 Cranch, xviii. At the same term, in *Lloyd* v. *Alexander* (id. 365), the reason for the adoption of the rule is stated, and in *Welch* v. *Mandeville* (5 id. 321), the court decided that when the citation was not served thirty days before the term, the defendant in error would not be required to go to a hearing without his consent. The meaning of the statute is not that the citation shall be served thirty days before the return-day, but that the defendant in error shall have at least thirty days' notice before he can be compelled to go to a hearing. We do not understand that the case of *Yeaton* v. *Lenox* (7 Pet. 220) holds otherwise. Certainly there was nothing in the facts to require any such decision.

As the return-day of the writ is changed, a new citation should issue to notify the defendant in error of what has been done. This is clearly within the rule as stated in *Dayton* v. *Lash*, 94 U. S. 112.

The transcript may be filed and the cause docketed upon a compliance by the plaintiff in error with the rules in that particular.

An order will be entered allowing the plaintiff in error to amend the writ by inserting the third Monday of the present term as the return-day, in lieu of the "second Monday in October," and requiring him to cause a new citation, returnable on the first Monday in May next, to be issued and served on the defendant in error.

So ordered.

STRINGFELLOW v. CAIN.

1. Under the act entitled "An Act concerning the practice in territorial courts, and appeals therefrom," approved April 7, 1874 (18 Stat. pt. 3, p. 27), the appellate jurisdiction of this court over the judgment or the decree rendered by a territorial court in a case not tried by a jury can only be exercised by appeal.
2. Where the record of a suit is duly certified upon an appeal to a district court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its order refusing a new trial and from its judgment are taken to the Supreme Court of that Territory, the statute whereof requires a statement, to be settled by the judge who heard the cause, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them, and no more;" and where a statement settled and signed by him, and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the District Court, upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to the said Supreme Court, — *Held*, 1. That the proceeding was thus made to conform to the requirements of the Practice Act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. 2. That if that court reverses the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing here; but if it has all the evidence which could be considered below, should the case be remanded, it may state the facts established by the evidence and render judgment. On an appeal to this court, the case, if otherwise properly here, will be determined upon the facts so stated. 3. That if the findings of the District Court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the said Supreme Court, and they, for the purpose of an appeal here, furnish a sufficient statement of the facts of the case, within the meaning of the act "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874 *Supra*.

3. A., possessed of a lot in the city of Salt Lake, Utah, died in 1857, leaving a widow and minor children. Under the act of March 2, 1867 (14 Stat. 541), the mayor, Nov. 4, 1871, duly entered at the proper land-office the lands occupied as the site of the city, and received, June 1, 1872, a patent therefor, "in trust for the several use and benefit of the occupants thereof according to their respective interests." The legislature of the Territory prescribed, by a statute approved Feb. 17, 1869, rules and regulations for the execution of such trusts, and provided that the several lots and parcels within the limits of the lands so entered should be conveyed to "the rightful owner of possession, occupant, or occupants," or to such persons as might be entitled to the occupancy or possession. Shortly after A.'s death his widow relinquished the possession of a part of the lot. She subsequently conveyed another portion thereof, and removed with her children therefrom. Another portion was sold by the administrator of A., to pay taxes assessed and debts incurred by making improvements upon the property after the latter's death. The purchaser paid full value therefor, and has since Dec. 10, 1869, remained in the exclusive possession thereof. *Held*, 1. That A. at the time of his death had, by reason of his possession of the lot, an inchoate right to the benefit of the act of Congress, should under its provisions the lands be entered, and that his right to maintain the possession as against the other inhabitants of the city descended under the laws of Utah to his widow and children. 2. That the withdrawal of the widow and children from parts of the lot, and her voluntary surrender of all control over them, extinguished her and their rights as to such parts. 3. That, under the territorial statute, an occupant of a lot could sell and convey his possessory rights therein, before the lands were so entered. 4. That the purchaser from the administrator is entitled to a conveyance from the mayor. 5. That the widow and children of A. are entitled to a deed from the mayor conveying to them, according to their respective interests, that part of the lot whereof they were in possession at the time the lands were entered.

ERROR to and appeal from the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. George W. Biddle and *Mr. J. L. Rawlins* for Stringfellow.

Mr. Robert N. Baskin, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

By the act of Congress "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874 (18 Stat. pt. 3, p. 27), the appellate jurisdiction of this court over the judgments and decrees of the territorial courts in cases of trial by jury is to be exercised by a writ of error, and in all

other cases by appeal. It follows that the appeal in this case was properly taken, and that the writ of error must be dismissed.

An important question arising under that part of the Civil Practice Act of Utah which relates to appeals in a civil action from the District Court to the Supreme Court of the Territory has been elaborately discussed in the argument, but in the view we take of the case it need not be decided. This is a special statutory proceeding, instituted in a Probate Court to settle disputes between claimants as to their respective rights under the trust created through the purchase, by the mayor of Salt Lake City, of the lands on which the city stands, pursuant to the authority for that purpose granted by the act of March 2, 1867 (14 Stat. 541), "for the relief of the inhabitants of cities and towns upon the public lands," and the several acts amendatory thereof. The territorial statute under which this trust is to be carried into execution (Comp. Laws Utah, 1876, 879) requires parties interested to sign a statement in writing containing the particulars of their claim, and deliver it to the clerk of the Probate Court of the county. If there are conflicting claimants, it is made the duty of the probate judge to call them before him, "and proceed to hear the proof adduced and the allegations of the parties, and decide according to the justice of the case." The statements filed stand in the place of pleadings. The court is required to cause full minutes of the testimony to be kept, which must be preserved with the papers, and entered on the record with the decision at length. If either party is aggrieved by the decision, he may appeal to the District Court, as in other cases, and upon the perfection of an appeal the Probate Court must "cause the testimony and written proofs adduced, together with the statements of the parties and the judgment of the court, to be certified to the District Court, to be there tried anew, without pleadings, except as above provided."

This case was heard in the District Court on the record certified up in accordance with these requirements, and in giving its decision the court stated its findings of fact and conclusions of law separately. In this it followed the rule prescribed by the Civil Practice Act of Utah, on a trial by the court of an

issue of fact in a civil action. After the decision had been made, the present appellees moved for a new trial, on the ground that the evidence was not sufficient to support the findings. This motion was denied, and appeals were thereupon taken to the territorial Supreme Court, both from the judgment and the order refusing a new trial. Such appeals are allowed by the Practice Act. When an appeal is taken to the Supreme Court of the Territory, the law requires a statement to be settled and signed by the judge who heard the cause, which shall set forth "specifically the particular errors or grounds" relied on, "and contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more." This statement is annexed to the copy of the judgment roll or order appealed from and furnished to the Supreme Court. Comp. Laws Utah, 1876, 493, 494.

The statement settled and signed in this case, annexed to the copy of the order refusing a new trial appealed from, contained all the "testimony, written proofs, and statements of the parties" certified up from the Probate Court, and upon which the trial was had; and it was stipulated that the statement on the appeal from this order might be used, so far as applicable, on the appeal from the judgment. Thus, the proceeding was made to conform to the regulations of the Practice Act in reference to appeals in civil actions, and the court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether the facts as found would support the judgment. In short, the Supreme Court of the Territory was called upon to determine whether, according to the justice of the case as shown by the record, the judgment of the District Court was right.

The act of April 7, 1874 (*supra*), provides that on appeals to this court from the territorial courts, in cases where there has been no trial by jury, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to this court with the transcript of the proceedings and judgment or decree. Under this act, if the findings of the District Court are sustained by

the Supreme Court, and a general judgment of affirmance rendered, the findings of the District Court, thus approved by the Supreme Court, will furnish a sufficient "statement of the facts of the case" for the purposes of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment. But if, as in this case, the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal. Without undertaking to decide what would be the proper practice in an ordinary civil action when a judgment is reversed because a new trial was refused in the District Court, we are clearly of the opinion that in a suit like this, where all the evidence is before the Supreme Court that could be considered by the District Court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the District Court. To remand the case for a new trial would be in substance only to direct the District Court to state the facts as found by the Supreme Court and adjudge accordingly. This would make another appeal to the Supreme Court necessary in order to put the case in a situation for a review in this court, the probabilities being that on such an appeal the Supreme Court would be called upon to do no more than affirm its former judgment. There is no statute of the Territory which in express terms creates the necessity for such a circuity of action, and we do not think the Practice Act, when fairly interpreted, requires it. Upon a new trial no new testimony could be introduced. The District Court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from those facts may just as well be settled by the Supreme Court on the first appeal as on a second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court, and this brings us to the inquiry whether, upon these facts, the judgment appealed from was right.

The act of March 2, 1867 (*supra*), provides that the "land so settled and occupied" for a town site may be entered at the

land-office, "in trust for the several use and benefit of the occupants thereof according to their respective interests," and that the execution of the trust shall "be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory." The legislature of Utah enacted that the lands so acquired in trust should be conveyed to the "rightful owner of possession, occupant, or occupants," or to such persons as might be entitled to the occupancy or possession. Comp. Laws, 381.

In *Cofield* v. *McClelland* (16 Wall. 331), this court decided that the act of Congress created the trust in favor of those who at the time the entry was made were occupants, or entitled to the occupancy.

In *Hussey* v. *Smith* (*supra*, p. 20), we held that a non-resident might, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust. The power of an occupant to sell and convey his possessory rights is clearly recognized by the territorial statute.

It is expressly found that the appellees were not in the actual possession of any part of the lot, except that which was adjudged to them by the District Court, when the entry was made by the corporate authorities. Joseph Cain died in 1857, leaving his widow, Elizabeth Cain, and two minor children, Elizabeth, now Mrs. Crimson, aged nine years, and Joseph M., aged seven. He then occupied the whole of the east half of the lot in question as his homestead. Soon after his death, Brigham Young set up a claim to the north half of the premises, and the widow, without recognizing his right, submitted to his demand. Young afterwards assumed to control the property, and transferred a part of it by deed to Jennings, who went into possession, claiming the right of occupancy, and under his occupation improvements were made by himself or his tenants. Young was never himself an actual occupant, but it is found that when the testimony was taken the Co-operative Company was in possession, paying him rent. It does not, however, distinctly appear from the findings whether either Jennings or the company were occupying the property when the entry was made at the land-office.

At some time after the death of Cain, his widow sold and conveyed to Charles King all "her right of claim, interest, and possession" in that part of the south half of the premises in controversy which was claimed by Jennings and adjudged by the District Court to him. When the testimony was taken in the case, the Co-operative Mercantile Company was in actual possession of this part of the lot, paying rent to Jennings. It is not stated definitely when this conveyance was made by Mrs. Cain or when the tenants of Jennings went into possession, though it is found that Jennings himself was never an actual occupant of the property.

On the 10th of December, 1869, the Stringfellow Brothers went into the possession of that part of the premises claimed by them, under a sale made by the administrators of Cain to pay taxes assessed upon the property after his death, and to pay debts incurred for improvements also made after his death. They paid for the property its full market value at the time, and were in the actual occupation when the entry was made by the corporate authorities at the land-office. The children of Cain were not made parties to the proceedings in the Probate Court to obtain an order for the sale, but from the time the sale was made until the statements were filed in the office of the clerk of the Probate Court, neither they nor their mother had possession of the premises which were sold.

Upon this state of facts it is apparent that the real question to be settled is whether the children of Cain retain the benefit of their father's occupancy of that part of the lot in controversy not in their actual possession when the town site was entered at the land-office by the corporate authorities. All the interest their father had in the lot when he died was an inchoate right to the benefit of the town-site law in case the property should be purchased from the United States by the corporate authorities under the provisions of that law. All he could do was to maintain his occupancy, and claim the statutory trust in his favor in case that trust should be created. He held the position of one seeking to acquire a title by a possession adverse to all the other inhabitants of the town. His right to maintain this adverse possession descended under the laws of Utah to his widow and children. There can be no doubt that the possession

the children thus acquired, if continued, would have ripened into a perfect title under the trust.

The infants could not bind themselves by contract to sell and convey their possessory rights, but they might lose their rights by a failure to keep possession. They need not maintain an actual occupancy, but they must in some form retain control of the property to the exclusion of an adverse entry. When Cain died, the mother became the head of the family and by the laws of Utah the natural guardian of the children. In this way she had by law the control of their persons. If she remained in the possession of the property she necessarily did so for the benefit of her children and herself in proportion to their respective interests in the inheritance; but if she voluntarily withdrew from the property and gave it up to others, the rights of the children as well as herself, which depended upon keeping the possession, were gone. The adverse possession commenced by the father might in this way be abandoned.

Applying these principles to the facts as stated we think it clear that the rights which the children had as occupants on their father's death were given up by their mother, except as to that part of the lot they had in actual possession when the corporate authorities purchased the land from the government. Soon after the death of the father the mother yielded up the possession of the north half of the lot on the demand of Mr. Young, the leader of the Mormon Church, to which she and her husband during his life belonged. It matters not for the purposes of this inquiry whether this was rightfully or wrongfully done. In point of fact it was done many years before the purchase from the government. After that Young assumed the control of the property so surrendered and deeded some part of it away. Subsequently the mother sold and conveyed to King that part of the south half which is now claimed by Jennings. From the facts as stated it may fairly be presumed that this was done to save or improve the remainder. Her husband when he died owed no debts, and so far as appears had no considerable amount of property except his possessory rights in this lot. To raise the means to pay taxes which accrued after his death, and to pay debts incurred for improve

ments also made after his death, his administrators sold that part of the south half now claimed by the Stringfellows, and received its full value in money. When these several sales were made the mother withdrew with her children from the occupancy, and the Stringfellows made an actual entry in December, 1869, which they have kept up until the present time. If the mother was not technically the guardian in socage of the children, she occupied under the circumstances the place of such a guardian, and Mrs. Crimson, who was then unmarried, must have been of full age when the Stringfellows took their possession. We cannot see how there could be an abandonment if this is not, and it seems clear to our minds that it must have been made by the mother in an honest effort on her part to save all she could of that which the father by his original occupancy had endeavored to secure.

We are, therefore, of the opinion, from the facts as they are stated by the Supreme Court: —

1. That the surrender of the north half of the lot by Mrs. Cain on the demand of Young was such an abandonment of the possession as deprived her and her children of the right to claim title to that part of the lot without a subsequent entry, which is not shown.

2. That the conveyance by Mrs. Cain to King operated in the same way in respect to that part of the south half of the lot embraced in her deed to him.

3. That the administrator's sale had the same effect as to that part of the lot bought by George and Samuel Stringfellow, or one of them.

4. That George and Samuel Stringfellow are entitled to a conveyance of that part of the lot described in the administrator's deed, and claimed by them in their statement filed with the clerk of the Probate Court.

5. That the appellees are entitled to a conveyance of all that part of the south half of the premises not embraced in the deed of Mrs. Cain to King and in that of the administrators to Stringfellow, and no more.

The judgment of the Supreme Court of the Territory will therefore be reversed, and the cause remanded with instructions: 1. To enter or cause to be entered in the proper court a judg-

ment in favor of George Stringfellow and Samuel Stringfellow for that part of the lot purchased by them at the administrator's sale. 2. To enter or cause to be entered a judgment in favor of the appellees, according to their respective interests under their inheritance from Joseph Cain, for that part of the south half of the premises in controversy not sold to Stringfellows and King, and dismissing their claim as to all the rest and residue of the lot. 3. To rehear the case upon the evidence sent up from the District Court in respect to the claims of Jennings and Young as against the corporate authorities of Salt Lake City, and decide according to the justice of the case.

The appellees will pay the costs of this appeal.

Judgment reversed.

MR. JUSTICE STRONG and MR. JUSTICE BRADLEY did not sit in this case nor take any part in deciding it.

CANNON v. PRATT.

1. The doctrine in *Stringfellow* v. *Cain* (*supra*, p. 610) reaffirmed.
2. The Probate Court of Utah has jurisdiction to determine the conflicting rights of claimants to lots forming part of the lands in that Territory entered as a town site under the act of Congress of March 2, 1867 (14 Stat. 541), and an appeal may be taken from the judgment of that court to the District Court, within one year after it has been rendered.
3. A judgment will not be reversed for error in excluding testimony which is cumulative only, if it is apparent that if received it would not affect the result.

APPEAL from the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. George W. Biddle and *Mr. J. L. Rawlins* for the appellants.

Mr. Robert N. Baskin, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This, like *Stringfellow* v. *Cain* (*supra*, p. 610), was a statu-

tory proceeding begun in the Probate Court of Salt Lake County, Utah, to settle disputes between claimants as to their respective rights to a lot in Salt Lake City, purchased by the mayor of the city from the United States, in trust, under the Town-Site Act of March 2, 1867, 14 Stat. 541. As doubts were entertained in respect to the proper manner of bringing it here for review, an appeal was taken and a writ of error sued out. For the reasons stated in that case, the appeal is sustained and the writ of error dismissed.

The controversy arises as to the ownership of the south half of lot 5, block 76, plat A, and the first question to be settled is in respect to the jurisdiction of the District Court on the appeal from the Probate Court. The decision of the Probate Court was given Nov. 28, 1873, and the appeal taken Feb. 3, 1874. The territorial act of 1869, regulating the execution of town-site trusts (Comp. Laws Utah (1876), 381), provides that if either party shall feel aggrieved at the decision of the Probate Court, he may appeal to the District Court "as in other cases." In *Golding* v. *Jennings* (1 Utah, 135), it was decided that there could be no appeal from the Probate Court to the District Court in a civil action, because the Probate Court did not have jurisdiction of such actions. Here the Probate Court had jurisdiction of the suit, and the right of appeal is expressly given. The difficulty is not as to the right of appeal, but as to the time within which the appeal is to be taken. The Civil Practice Act of Utah (Comp. Laws (1876), 492) provides that an appeal may be taken "from a final judgment in an action or special proceedings commenced in the court in which the judgment is rendered, within one year from the rendition of the judgment," and "from a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment." This, we think, governs the present case. The provision in the territorial act relating to the judiciary, approved Jan. 19, 1855, fixing the time for appeals from the probate to the district courts at thirty days, is in conflict with the Civil Practice Act in this particular, and comes within the repealing clause of the latter act.

Upon the appeal from the Probate Court to the District Court, "all the testimony and written proofs adduced, to-

gether with the statements of the parties and the judgment of the court," were certified up as required by the territorial town-site law. Upon the trial, the District Court decided that the execution of a deed from Orson Pratt to Brigham Young, which was sent up as part of the written proofs below, had not been sufficiently shown. For this reason the deed was excluded as evidence. The District Court also excluded as evidence the answers of Brigham Young, Jr., to two interrogatories which had been propounded to him, and also the answers of Hamilton G. Park to interrogatories propounded to him. The same thing was done in respect to the answers of Brigham Young, Sen., to five interrogatories. The excluded testimony of Brigham Young, Jr., related to the payment of rent for the premises in dispute to him as agent for his father, Brigham Young, Sen., after the claim of Mrs. Pratt, the appellee, had been filed with the clerk of the Probate Court. The testimony of Park related to payment of rent for the lot by one Ellerbach, as agent of Orson Pratt, to him as the agent of Brigham Young, Sen., from the fall of 1867 to the spring of 1869. The testimony of Brigham Young, Sen., related to his purchase of the lot from Orson Pratt in 1861 or 1862, and he also said that he was the owner of the lot with two tenants on it. Objections to all the testimony which was excluded had been taken and entered upon the minutes in the Probate Court.

Upon the trial in the District Court the facts were found, and as a conclusion of law judgment was given in favor of Mrs. Pratt. Brigham Young, Sen., the adverse claimant, moved for a new trial, because the findings were against the evidence. This motion was overruled, and he thereupon appealed to the territorial Supreme Court both from the judgment and the order refusing a new trial. A statement of the case was made on these appeals, which included all the testimony with the exceptions and the entire record of the proceedings in the District Court. The Supreme Court affirmed generally the judgment of the District Court.

As we held in *Stringfellow* v. *Cain*, when the Supreme Court affirms the judgment of the District Court upon findings of fact made by the District Court, the Supreme Court

in effect adopts such findings as its own for the purposes of an appeal to this court. We are therefore to consider the case here upon the facts found by the District Court. These findings show that Sarah M. Pratt, the present claimant and appellee, and Orson Pratt, settled on the lot in controversy about the year 1854. Mrs. Pratt erected a house and fences upon the lot, and the two lived there until 1861, when they went to the southern part of the Territory. After that for several years Brigham Young, Sen., had possession of the lot by his tenants, but in 1867 or early in 1868 he told Mrs. Pratt she might have back the south half, and accordingly she and her family went into possession on the 12th of March, 1868, and have occupied it as their home ever since. Orson Pratt has not lived with his wife, Sarah M. Pratt, since March 12, 1868, and he has five other families, four of which are residents of Salt Lake City. Mrs. Pratt and her children have supported themselves by their labor and means since March 12, 1868, and have put improvements on the lot by repairing the house, fencing, setting out trees, &c. Mrs. Pratt was the head of her family for ten years previous to November, 1873. No rent has been claimed of or paid by her since she went into possession, nor by Orson Pratt or any agent of his since that time. Orson Pratt has not supported his wife, Sarah M. Pratt, or her family since March, 1868, and has contributed bnt a very small amount for that purpose. The town site was purchased by the mayor, under the provisions of the Congressional Town-Site Act, Nov. 21, 1871. Young filed his declaratory statement in the office of the probate clerk, Jan. 13, 1872, and Mrs. Pratt filed hers April 9, 1872.

Upon this state of facts it is clear that the judgment appealed from was right, unless there was error in the rulings as to the admissibility of evidence. The original occupancy of Orson Pratt and his wife was abandoned in 1861. Brigham Young then entered into possession. It matters not, for the purposes of this inquiry, whether he purchased the possessory rights of Pratt and his wife or not. They voluntarily left the lot and he took it. Then in 1868 he gave back the south half to Mrs Pratt, and she has occupied adversely ever since. Under the rule settled in *Stringfellow* v. *Cain*, this gave her

the right to a conveyance under the trust created by the town-site purchase.

It remains only to consider the several objections to the rulings upon the admissibility of the evidence. From what has been said it is clear that the exclusion of the deed was immaterial. As Pratt and his wife abandoned the possession in 1861, it is of no consequence whether Young occupied after that as their vendee or as an adverse possessor. He was in possession claiming title, and they were out with no apparent purpose of returning. That is all that is necessary to make his right good as against their previous entry.

As to the testimony of Brigham Young, Jr., it related to a payment of rent by Orson Pratt after this proceeding was begun in the Probate Court. Of course that, under the circumstances, could have no effect adverse to Mrs. Pratt's title.

As to the testimony of Brigham Young, Sen., it was clearly immaterial or incompetent. That in respect to his purchase from Pratt was immaterial, because his rights prior to his putting Mrs. Pratt in possession the second time are not disputed. His statement that he owned the property was incompetent. That depended upon the facts, and his statement was no more than an expression of his opinion.

The testimony of Park, so far as it related to the ownership of the property, was also incompetent, as it was in reality only an expression of his opinion. As to the collection of rent from Orson Pratt, he says his collections were made from T. W. Ellerbach, as the agent of Pratt, and in the testimony of Ellerbach the same payments are shown, with the manner of payment and his authority as agent. No possible harm could have resulted from the exclusion of this evidence. A judgment will not be reversed for error in excluding testimony which is cumulative only, if it is apparent that if received it would not affect the result. In this case the rejected evidence was all before the Supreme Court, and was there considered. In the opinion it is in effect said that if the evidence had been admitted in the court below, and if that court had given it all the force which could be reasonably claimed, the result must have been the same. Under these circumstances we must con-

sider the case as coming here from the Supreme Court, with the facts found upon all the evidence.

Upon the whole case we are satisfied with the judgment below.

Judgment affirmed.

MR. JUSTICE BRADLEY did not hear the argument in this case or take part in its decision.

COMMISSIONERS v. SELLEW.

A county in Kansas is a body politic, whose powers are exercised by a board of county commissioners, and when it is sued, process must be served upon the clerk of the board. Where, therefore, a *mandamus* was awarded against it, — *Held*, 1. That the writ was properly directed to it in its corporate name. 2. That service of a copy of the writ upon the clerk is service upon the corporation, and the members of the board who fail to perform the required act are subject to be punished for contempt.

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Mr. Matt. H. Carpenter for the plaintiff in error.

Mr. E. Stillings, *Mr. L. B. Wheat*, and *Mr. T. A. Hurd*, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In the State of Kansas counties are bodies corporate and politic, capable of suing and being sued. Their powers are exercised by boards of county commissioners chosen by the electors. The name by which they can sue or be sued is the "Board of County Commissioners of the County of ——." In legal proceedings against a county, process is served on the clerk of the board. 1 Dassler's Kans. Stat. 217–221, sects. 1, 3, 5, 6, 9.

The boards of county commissioners are authorized "to apportion and order the levying of taxes as provided by law" (1 id. 224, sect. 16, sub. 4), and they are required to meet on

the first Monday in August of each year to "estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes they may be required by law to levy." 2 id. 1024, sect. 83.

Whenever a judgment is rendered against the board of county commissioners of a county, no execution shall issue, but the judgment "shall be levied and collected by tax, as other county charges, and, when so collected, shall be paid by the county treasurer to the person to whom the same shall be adjudged, upon the delivery of the proper voucher therefor" 1 id. 221, sect. 8.

By an act of the legislature of the State, approved Feb. 10, 1865, and proceedings thereunder, the board of county commissioners of the county of Leavenworth were authorized to subscribe to the capital stock of the Leavenworth and Missouri Pacific Railroad Company, and to issue bonds in payment of the subscription. Under this authority a subscription was made and bonds issued, bearing date July 1, 1865, and falling due July 1, 1875.

On the 29th of November, 1875, Sellew, the defendant in error, recovered judgment in the Circuit Court of the United States for the District of Kansas against the board of county commissioners of the county of Leavenworth upon part of the bonds so issued for $19,923.40 and costs of suit. On the 9th of October, 1877, he made known to the court, by affidavit, that on the 6th of August previous he had demanded of the board of county commissioners that they should levy a tax to pay his judgment, and that they had failed to do so. He then obtained from the court an alternative *mandamus* directed to the board of county commissioners, and to John S. Van Winkle, Ebenezer W. Lucas, and William S. Richards, individual members of the board, directing that they levy the tax immediately, or show cause, on the 26th of November, 1877, why it had not been done. Copies of this writ were in due form served on the clerk of the board and upon each of the individual members. On the return-day the board, appearing for the purpose of the motion only, moved to quash the alternative writ because it did not state facts sufficient to authorize the issue of a peremptory writ, and the several individual members answered, stating

that the board met on the first Monday in August, 1877, and estimated and determined the amount of money to be raised by taxation for all purposes for the year 1877; that having completed their labor, they adjourned *sine die;* that in due time afterwards the tax lists were made out, and on the 1st of November put in the hands of the treasurer for collection; that a part of the taxes so levied and collected had already been paid; that the judgment mentioned in the alternative writ was not rendered on any of the kinds of indebtedness mentioned in the proviso of sect. 1, c. 90, of the Session Laws of 1876; and that on the 6th of November, at the general election of county officers, Van Winkle and Lucas were not re-elected as members of the board, but that other persons were elected in their places, and that by reason thereof they would not be members of the board after their present term expired.

Chapter 90 of the Session Laws of 1876 was an act relating to taxation in Leavenworth County, and did not specially authorize a levy of taxes to pay this judgment, but it declared that no more taxes than were therein provided for should be levied.

On the 6th of December, 1877, a peremptory writ of *mandamus* was ordered "to and against the board of county commissioners of the county of Leavenworth, . . . commanding it to levy, on or before the first Monday in the month of August next, and collect at the same time and in the same manner that general taxes are levied and collected, . . . a tax on all taxable property . . . in said county of Leavenworth . . sufficient in amount to pay the judgment," &c.

To reverse this judgment this writ of error has been sued out.

In *United States* v. *Boutwell* (17 Wall. 604), it was decided that as a *mandamus* was used "to compel the performance of a duty resting upon the person to whom the writ is sent," if directed to a public officer, it abated on his death or his retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was "aimed exclusively against him as a person." Here the writ is sent against the board of

county commissioners, a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone. As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation.

We think, therefore, that the peremptory writ was properly directed to the board in its corporate capacity. In this way the power of the writ is retained until the thing is done which is commanded, and it may at all times be enforced, through those who are for the time being charged with the obligation of acting for the corporation. If, in the course of the proceedings, it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the board at the time when the board is required to act will be the parties to whom the court will look for the performance of what is

demanded. As the corporation cannot die or retire from the office it holds, the writ cannot abate as it did in Boutwell's case. The decisions in the State courts in which this practice is sustained are numerous. *Maddox* v. *Graham*, 2 Metc. (Ky.) 56; *Soutter* v. *The City of Madison*, 15 Wis. 30; *Pegram* v. *Commissioners of Cleaveland County*, 65 N. C. 114; *The People* v. *Collins*, 19 Wend. (N. Y.) 56.

This disposes of the only question which has been argued here. It is not contended that the law of 1876 presented any valid objection to the levy of the tax. *Von Hoffman* v. *City of Quincy* (4 Wall. 535) and *Butz* v. *City of Muscatine* (8 id. 575) are decisive of this point.

The judgment of the Circuit Court will be affirmed, but as during the pendency of this writ the time has gone by when by the terms of the order for the peremptory writ the board was directed to levy the tax in question, the cause will be remanded with authority, if necessary, to so modify the order which has been entered, in respect to the time for the levy and collection of the tax, as to make the writ effective for the end to be accomplished; and it is

So ordered.

NATIONAL BANK *v.* CASE.

1. A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred.
2. A national bank which had so accepted, and caused to be transferred to it, shares of stock of another national bank, was, on the latter becoming insolvent, sued as a stockholder. *Held*, that a loan of money by a national bank on such security is not prohibited by law; and, if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom.
3. The order of the Comptroller of the Currency prescribing to what extent the individual liability of the stockholders of an insolvent national bank shall be enforced, is conclusive.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This is a bill brought by Frank F. Case, receiver of the Crescent City National Bank of New Orleans, against the stockholders of that institution, to pay him seventy per cent of the par value of the stock owned by them severally at the time when their respective liabilities were fixed by its insolvency, without regard to any pretended transfers of such stock as they may have attempted to make after the insolvency occurred. As to some of the defendants the bill was dismissed; as to others, a decree was rendered conformably to the prayer of the bill, and a writ of execution awarded against them and their property to enforce the payment of the sums adjudged to be due by them respectively. Among the defendants against whom the decree was rendered was the Germania National Bank of New Orleans, Alcus, Scherck, & Autey, The Crescent Mutual Insurance Company, and Benjamin J. West. They thereupon appealed here.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Thomas J. Durant* for the appellants, and by *Mr. Charles Case* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed, and the bank lost heavily by the failure, — nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest.

In reference to the alleged ownership by the Germania Bank (one of the appellants) of shares in the Crescent City Bank, the facts appear to be as follows: On the fourteenth day of December, 1872, it loaned to Phelps, McCullough, & Co. $14,000 on a note of the firm dated Dec. 7, 1872, payable in ninety days, and to secure the payment of the loan the borrowers pledged to the bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the

note, to dispose of the stock for cash, at public or private sale, without recourse to legal proceedings, and to this end to make transfers on the books of the corporation whose stock it was. At the same time a power of attorney was given to Mr. Roehl, empowering him to transfer the stock to the Germania Bank, of which he was cashier. The note fell due on the 10th of March, 1873, and was not paid, and on that day a transfer of the one hundred shares to the Germania Bank was made on the transfer books of the Crescent City Bank. The Germania then caused seventy-six of the shares to be transferred to William A. Waldo, one of its clerks, and on the next day transferred to him the remainder. It has ever since stood in his name. Waldo acquired by the transfer no beneficial interest in the stock, and there was an understanding between him and the officers of the bank that he should retransfer it at their request. The cashier has testified, in answer to the question, "Was not the transfer made (to Waldo) with the view to avoid the liability under the National Bank Act in case of suspension of the Crescent City Bank?" that it was not exactly in that way. "We simply transferred," says he, "because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name. That was the object." When further asked whether he was well aware of the fact that the stockholders of national banks were liable to contribute to the payment of their debts in case of insolvency, he replied in the affirmative. When asked whether he did not have that in contemplation at the time of this transfer, he answered, "That may be one of the reasons why we did not want to own any stock." And when further asked, "Was not that one of the principal motives of this transfer to Waldo?" his reply was, "Yes."

From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCullough, & Co. were no longer the owners.

Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton* (96 U. S. 328); and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* v. *Storm*, 6 Hill (N. Y.), 624; *Roosevelt* v. *Brown*, 11 N. Y. 148; *Holyoke Bank* v. *Burnham*, 11 Cush. (Mass.) 183; *Magruder* v. *Colston*, 44 Md. 349; *Crease* v. *Babcock*, 10 Metc. (Mass.) 525; *Wheelock* v. *Kost*, 77 Ill. 296; *Empire City Bank*, 18 N. Y. 199; *Hale* v. *Walker*, 31 Iowa, 344. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on "The Liability of Stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide* c. 13.

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough, & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect

themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out;" that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham, — if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, "but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for nought, and the transferrer will be put upon the list of contributories." *Williams's Case*, Law Rep. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, id. 223; *Kintrea's Case*, Law Rep. 5 Ch. 95. See also Lindley on Partnership (2d ed.), p. 1352; *Chinnock's Case*, 1 Johns. (Eng.) Ch. 714; *Hyam's Case*, 1 De G., F. & J. 75; *Budd's Case*, 3 id. 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out." *Nathan* v. *Whitlock*, 9 Paige (N. Y.), 152; *McClaren* v. *Franciscus*, 43 Mo. 452; *Marcy* v. *Clark*, 17 Mass. 329; *Johnson* v. *Laflin*, by Dillon, J., 6 Cent. Law Jour. 131.

The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the trans

ferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the Circuit Court against the Germania Bank was correct. Its case, no doubt, is a hard one; but it is not in our power to give relief, without a sacrifice of the well-established rules of law and equity both in this country and in England.

There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.

In support of the other appeals which were taken from the decree of the court below, no argument has been submitted, and they require only brief remarks.

Alcus, Scherck, & Autey in their first answer to the bill, after setting forth several matters perfectly immaterial, admit that they were at one time the owners of seventy shares of the stock of the Crescent City National Bank, but aver that on the [blank] day of [blank], 1873, they sold them all to one Julius Fox, a white person, about twenty-one years old, and a clerk by occupation; that the price paid to them by Fox for the stock was five dollars, and that they never offered to Fox any money or other valuable consideration or promise to induce him to accept the stock. The utter worthlessness of this as a defence sufficiently appears in what we have said respecting the appeal of the Germania Bank. Subsequently what is called a supplemental and amended answer was filed, quite inconsistent with the one first made. It admits the ownership of the stock by the respondents at the time of the bank's insolvency and suspension, and merely denies any unlawful confederacy. That no defence was shown by this supplemental answer we need spend no time to prove.

The only material averment in the answer of the Crescent Mutual Insurance Company was, in substance, that they had owned shares of the stock of the Crescent City Bank before it became a national bank, and that though the State bank had become a national bank with their consent, and they had received dividends, they had not received new certificates. The stock ledgers of the bank, however, show that one hundred and thirty shares stood in their name when the bank failed, and, therefore, taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders.

The appeal of Benjamin J. West is equally without merit. It was admitted by his answer and proved by his own testimony that on the 13th of March, 1873, the day before the bank ceased paying its depositors, he was the owner of fifty-eight shares of its stock. On that day he transferred it to one Vincent, whom he describes as a white man, about thirty-five years old, a salesman by trade, for the price of about ten dollars a share. Nothing more than the testimony of Mr. West himself is needed to show that this is what is called in the English books a sham sale, made to conceal his liability. Vincent was West's clerk at the time, and, so far as it appears, without any pecuniary responsibility. No certificate of the stock was issued to him. He paid nothing at the time of the alleged transfer, and never has paid any thing since. He gave no note or other written acknowledgment of indebtedness, and West continued to pay his salary as a clerk six or eight months after the transfer, without deducting any thing for the price of the stock. Indeed, the price of the stock was never charged against Vincent in West's books. Add to this the fact plainly visible in his testimony, that the alleged transfer was made when Mr. West had become alarmed about the condition of the bank, and nothing more is needed to show that it was inoperative, as against the creditors of the bank, according to the doctrine of the cases hereinbefore cited.

There are some other averments in the answer of the appellants of which it is hardly necessary to say any thing. Former decisions of this court have ruled that the determination of the Comptroller of the Currency and his order to the receiver are

conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

Decree affirmed

TRANSPORTATION COMPANY v. CHICAGO.

1 That which the law authorizes cannot be a nuisance such as to give a common-law right of action.

2. A municipal corporation, authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, where it crosses the street, incurs no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute.

3. If the fee of the street is in the adjoining lot-owners, the State has an easement to adapt the street to easy and safe passage over its entire length and breadth. When making or improving the streets within its limits, in the exercise of an authority conferred by statute, a city is the agent of the State, and, if it acts within that authority, and with due care, despatch, and skill, is not at common law answerable for consequential damages.

4. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor.

5. The owner who makes excavations on his land is liable, if he thereby deprives that of adjoining proprietors of its lateral support, while it is in its natural condition; but their right to such support does not protect whatever they have placed upon the soil increasing the downward and lateral pressure.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of trespass on the case by the Northern Transportation Company of Ohio against Chicago, Ill., to recover damages sustained by reason of the construction by that city of a tunnel under the Chicago River along the line of La Salle Street. The company offered evidence tending to prove that it possessed a certain lot in Chicago, with dock and wharfing rights and privileges; that it owned a line of steamers running between Ogdensburgh, New York, and Chicago, and touching at intermediate points; that during 1869 and 1870 it

had thirteen or fourteen of them employed, five of them arriving and departing each week from its dock on said lot, where it had, at an expense of $17,000, constructed a warehouse and shed used in loading and unloading them, and where its office was located; that its dock extended eighty feet on the south side of the lot which abutted on the Chicago River, a navigable stream; that the city commenced, Nov. 1, 1869, building a tunnel under the river on the east line of the lot at its intersection with the river and La Salle Street, and erected a coffer-dam in front of the dock; that said dam remained until some time in August, 1870; that about Nov. 1, 1869, the city commenced excavating La Salle Street, and excavated it for some distance, blocking up the doors of the warehouse on that street, and leaving free only the entrance on Water Street; that by reason of the construction of said dam plaintiff was unable to bring its boats up to the dock or to land freight and passengers thereat, and was compelled to rent and remove to other docks and sheds; and that the negligent and improper manner in which the work, especially the excavating, was done, greatly damaged and injured the warehouse, and caused the walls to crack, settle, and in several places to fall.

The city offered testimony tending to prove that the work was, without unnecessary delay, well and carefully done; that the coffer-dam as constructed was required for the construction of the tunnel; that the company could during the time have had access with its boats to a portion of the lot; and that the obstructions complained of were unavoidable in the proper construction of the tunnel.

To the following portions of the charge of the court to the jury the plaintiff excepted: —

"The defendant had the right under the law to enter upon La Salle Street and make such public improvements as in the judgment of the city authorities were necessary, and to construct the tunnel in question; and for that purpose to enter upon the portion of the river in front of the plaintiff's lot and construct the coffer-dam there, if it was necessary to enable them to construct the tunnel."

"The plaintiff took its lot subject to the right of the city to

make these necessary public improvements in the streets. The method of crossing the river at this point, whether by a ferry, a bridge, or a tunnel, was one to be determined by the city authorities; and when they had determined to effect the crossing by a tunnel, they had a right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill and care and despatch always in doing it, so as not unnecessarily to interfere with private property."

"Although the plaintiff may for the time being have been deprived of the beneficial use of its property by such entry upon the street, and access to the property through the street practically prevented by the occupation of the street for the purposes of constructing the tunnel, and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences, to which the plaintiff, as the owner of this lot, must submit in order that the public may be accommodated by the construction of this tunnel. The city had the same right to enter upon the river for the purpose of erecting works there to facilitate the construction of the tunnel that it had to enter upon the street and construct the tunnel itself, always, however, subject to the condition that they should not unnecessarily or negligently injure the plaintiff."

"There is left, however, the question to be considered by you in the light of the evidence as to whether this work in La Salle Street was so unskilfully or negligently done as to cause any part of the walls to fall or the building to be impaired. You have heard all the testimony bearing upon this question. It shows that the southeast corner of the warehouse, where the office and vault were situated, became so impaired by the cracking or leaning of the wall outwardly that it was deemed necessary to take it down; and it was taken down and rebuilt. Although there was no apparent settling of the ground in the immediate vicinity, nor any caving in, yet the wall seemed to fall from some cause from that point, and the claim is that it fell from the construction of this tunnel by some displacement of the surface, which was, perhaps, not apparent to the eye. You will also bear in mind that the evidence shows that further along, near the north end of the plaintiff's building, there was

a caving in of the bank, so that the earth near, or perhaps immediately under, the wall was to some extent displaced. The wall fell down there and was subsequently rebuilt, and the building repaired to some extent. You have heard all the testimony in regard to the extent of the repairs, and to the manner in which the building was left, and it is for you to say whether the building was substantially restored to its original condition by the repairs which were made, so that the plaintiff, on the removal of the coffer-dam, and the other obstructions to the access to the property, could again enter into the enjoyment of his property as fully as before. If you are satisfied that the building was not so far repaired as to make it as useful for the plaintiff's purposes as it was before these injuries occurred, then the plaintiff will be entitled to recover such damages as would make it as useful for his purposes."

The plaintiff asked the court to instruct the jury "that even if the city be entitled to lay a coffer-dam along across the river, they had no right to lay it in front of the company's lot and dock, and for any damages which it may have suffered by the coffer-dam being in front of its dock it is entitled to recover in this action;" but the court refused; the presiding judge stating, "I refuse the instruction, always assuming that the proof shows that the coffer-dam was a necessity. I look upon the river just as I do the street. The city had the same right to go into the river and construct a coffer-dam, in order to complete this work, that it had to go into a street and put down a track or any other work necessary in order to carry on improvements." To which the plaintiff duly excepted.

The court, on motion of the defendant, further charged the jury, "If you are satisfied from the evidence that the sinking or rather the cracking of the wall was due to the weight of the walls upon the selvage or portion of the earth which was left, and not to the removal of the material taken out of the street, that is, from the pit, then the defendant would not be liable. If you are satisfied that if the wall had not stood upon the plaintiff's lot at the place where it did, there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was caused by the weight of the wall resting upon

the earth after the excavation was made, then the defendant is not liable. The principle is precisely like two adjacent owners, one man building a building and sinking his foundation four feet into the ground, the adjoining owner may think it is necessary for him to set his six or ten feet into the ground, and he excavates for that purpose. Now, if the first wall built, by reason of its own weight, causes the earth to crush or cave away after the excavation below there has been made upon the adjoining lot, the owner of the adjoining lot making the deeper excavation is not liable. Each man, in other words, must look out for his own foundation." To all of which the plaintiff excepted.

There was a verdict for the defendant. Judgment was rendered thereon, and the company sued out this writ of error.

Mr. R. P. Spalding for the plaintiff in error.
Mr. Joseph F. Bonfield, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

We are of opinion that no error has been shown in this record, though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passageway along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the city they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended that there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.

The case has been argued on the assumption that the

erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large, and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction.

Here the tunnel of which the plaintiffs complain, or rather its construction, was authorized by an act of the legislature of the State, and directed by an ordinance of the city councils. This we do not understand to be denied, and it certainly cannot be. The State, and the city councils, as its agents, had full power over the highways of the city, to improve them for the uses for which they were made highways, and the construction of the tunnel was an exercise of that power. Since La Salle Street was extended across the river, the city not only had the power, but it was its duty, to provide for convenience of passage. This it could do either by the erection of a bridge, or by the construction of a tunnel under the river and along the line of the street. And the grant of power by the legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. We do not understand this to be controverted by the plaintiffs in error. Their argument is, that though the city had the legal right to construct the tunnel, and to do

what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property, yet it was liable to make compensation for the consequential damages caused to persons specially injured. To this we cannot assent.

It is immaterial whether the fee of the street was in the State or in the city or in the adjoining lot-holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the State, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *The Governor and Company of the British Cast-Plate Manufacturers* v. *Meredith*, 4 Durnf. & E. 794; in *Sutton* v. *Clarke*, 6 Taun. 28; and in *Boulton* v. *Crowther*, 2 Barn. & Cres. 703. It was asserted in *Green* v. *The Borough of Reading*, 9 Watts (Pa.), 382; *O'Connor* v. *Pittsburg*, 18 Pa. St. 187; in *Callendar* v. *Marsh*, 1 Pick. (Mass.) 418; as well as by the courts of numerous other States. It was asserted in *Smith* v. *The Corporation of Washington* (20 How. 135), in this court; and it has been held by the Supreme Court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there

be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, and in *Eaton* v. *Boston, Concord, & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

The present Constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be "taken or *damaged*" for public use without just compensation. This is an extension of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme Court of the State in *Chicago* v. *Rumsey*, recently decided, and reported in Chicago Legal News, vol. x. p. 333. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an

adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution. There would appear, therefore, to be little left in this case for controversy.

It is insisted, however, that the plaintiffs may recover for the obstruction to the access of their lot, caused by the coffer-dam in the river. It is admitted that the dam was necessary to enable the city to construct the tunnel under the river; and it is not complained that it was unskilfully built, or that it was kept in the stream longer than the necessities of the work required, but it is contended that neither the State nor the city had any right to obstruct passage on the river at all. Yet the river is a highway, a State highway as well as a national. It has long been held that navigable rivers wholly within a State are not outside of State jurisdiction so long as Congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this court can take no cognizance. *Wilson* v. *The Black Bird Creek Marsh Co.*, 2 Pet. 250. In numerous instances, States have authorized obstructions in navigable streams. They have authorized the erection of bridges, the piers of which have been more or less impediments to navigation. In this case the coffer-dam was only a temporary obstruction. It was no physical encroachment upon the plaintiffs' property, and it was maintained only so long as it was needed for the public improvement. The tunnel could not have been constructed without it. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the legislature, the obstruction not having been permanent or unreasonably prolonged.

We have examined the decisions of the courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents

to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction.

Very many of the decisions relied upon were cases in which it appeared that the acts complained of as having wrought injurious consequences were done by private individuals, for their own benefit, and without sufficient legislative authority. The distinction between cases of that kind and such as the present is very obvious. It was well stated by Gibbs, C. J., in *Sutton* v. *Clarke* (*supra*), which, as we have seen, was decided on the ground that the defendant was acting under the authority of an act of Parliament, deriving no advantage to himself personally, and acting to the best of his skill and within the scope of his authority, and so was not liable for consequential damages. "This case," said the Chief Justice, "is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor, he is liable. The resemblance fails in this most important point, that his act is not done for a public purpose but for private emolument. Here the defendant is not a volunteer: he executes a duty imposed upon him by the legislature, which he is bound to execute."

The observations we have made cover the whole case as made for the plaintiffs in error, except the point presented by the sixteenth assignment. That was not mentioned in the argument, but we will not overlook it.

There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiffs' buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given way. In reference to this testimony the court instructed the jury that if they were satisfied from the evidence that the sinking of the wall, or rather the cracking of the wall, was due to the weight of the wall upon the selvage or portion of the earth which was left, and not to the removal of the material

which was taken out of the street, that is, from the pit, the defendants were not liable. If they were satisfied that if the wall had not stood upon the plaintiffs' lot where it did there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was due to the weight of the wall resting upon the earth after the excavation was made, then the defendant was not liable for that.

We think this instruction was entirely right. The general rule may be admitted that every land-owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would put it in the power of a lot-owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. *Wyatt* v. *Harrison*, 3 Barn. & Adol. 871; *Lasala* v. *Holbrook*, 4 Paige (N. Y.), 169; Washburn, Easements, c. 4, sect. 1.

Judgment affirmed.

SPRING COMPANY *v.* EDGAR.

1. This was an action against the proprietor of a park, to recover for injuries sustained by A. from an attack by a male deer which, with other deer, was permitted to roam in the park, and which the declaration charged that the defendant knew to be dangerous. At the trial, evidence was introduced to show that the park was open and accessible to visitors; that A. was in the habit of visiting it, and when lawfully there was attacked by the deer and severely injured; that she had often seen deer — about nine in number, three of whom were bucks, the oldest four years old — running about on the lawn, and persons playing with them, and that she had there seen the sign, "Beware of the buck;" that the park contained about eleven acres; that notices were put up in the park a year or two before, cautioning visitors not to tease or worry the deer; that she had no knowledge or belief, prior to the attack

upon her, that the deer were dangerous, if not disturbed. Experts testified that in their opinion the male deer, at the season when the injury was sustained by A., was a dangerous animal. The bill of exceptions does not show that all the evidence for A. is set forth in it, or that the defendant introduced any. *Held*, that a motion to dismiss the action, nonsuit the plaintiff, and to direct the jury to return a verdict for the defendant, was properly denied.

2. The court called attention to the testimony of the experts, and instructed the jury that it was for them to determine its weight. *Held*, that the instruction was proper.

3. The jury were also instructed not to believe any extravagant statement of the injuries received by the plaintiff, and that, when they had made up their minds as to the amount really sustained, they should not be nice in the award of compensation, but that it should be liberal. The defendant did not request the instruction to be qualified or explained, or a different one given. *Held*, that the charge in that respect furnishes no ground for reversing the judgment.

ERROR to the Circuit Court of the United States for the Northern District of New York.

This is an action by Ann P. Edgar to recover from the Congress and Empire Spring Company $20,000 for personal injuries inflicted on her by a buck deer, the property of that company, in the Congress Spring Park at Saratoga Springs, New York.

The declaration charges that on and for a long time prior to Oct. 20, 1870, the defendant had been and was the owner and proprietor of "Congress Spring," from which the defendant has realized, and does realize, great gains and profits; that said spring has for a long time been kept open and accessible to the public generally, and all people have been invited to patronize its waters, in various forms, by the defendant; that, to make it more inviting and attractive, the defendant opened in connection therewith an extensive park, ornamented with fountains, trees, shrubbery, and flowers, through which extensive gravelled walks are made for the comfort of those who indulge in the use of the mineral waters and enjoy the landscape; that further to enhance the attractions of said park, the defendant obtained and in some degree domesticated several wild deer, among them a large and powerful buck, with large and dangerous horns, but of vicious character and habits, known as the "Ugly Buck;" that the defendant, its officers and agents, well knowing that the said buck was vicious, and dangerous to be

permitted to run at large in said park, did permit him to run at large in said park, and while the plaintiff had on that day visited said springs to partake of the waters, and was in the day time peaceably proceeding along one of the walks in said park, constructed by the defendant for the comfort of visitors, he did fiercely attack the plaintiff with his horns, head, and feet, and did bite, bruise, and greatly lacerate her in various parts of her person.

The company, in addition to the general issue, interposed a plea that the damage and injury complained of by the plaintiff was occasioned by her own fault and negligence, and by her refusal to obey the reasonable rules and regulations of the company, and by her voluntary disregard of the express notice given her to keep off the grass in the grounds, and not to interfere with or molest the buck.

At the trial, the plaintiff testified that on the morning in question, after drinking at the spring, she walked through the grounds, and met a deer which attacked her, goring and striking her with his head and horns, and greatly injuring her. On her cross-examination, she testified, in substance, that before the occurrence she had frequently been in the habit of going to Congress Spring Park to enjoy the water and the pleasure of a walk; that she noticed the deer in the park as early as 1866, and had often seen them running about on the lawn; that she had seen persons fondling the deer and playing with them on different occasions; and that she had noticed sign-boards through the park containing the notice, "Beware of the buck."

A witness for the plaintiff, introduced as an expert, testified that he was a dentist, and resided in Albany; that he was to some extent acquainted with the habits and nature of the deer, and had hunted them; that in his opinion the buck deer are not generally considered as dangerous, but that in the fall they are more dangerous than at other seasons. Another expert testified that he was a taxidermist, and had made natural history a study, and had read the standard authors in regard to the general characteristics of deer; that from his reading he was of opinion that the male deer, after they have attained their growth and become matured, are dangerous, and that dur-

ing the rutting season — from the middle of September to the middle of December — the buck deer are generally vicious. The defendant objected to all the testimony of the experts, on the ground that the witnesses had not shown themselves competent as experts, and that it was improper, immaterial, and incompetent; but the court overruled the objection, and the defendant excepted. Another witness for the plaintiff testified that the park contained about eleven acres; that in 1870 there were nine deer in the park, among them three bucks, the oldest of which was four years old; that he first learned that this buck was ugly when the plaintiff was knocked down; that in 1868 notices were put up in the park cautioning visitors not to tease or worry the deer; that such notices were posted at different places in the park; that the park was frequented by a great number of people, with the consent of the defendant, all through the season; that the object of keeping deer in the park was their beauty; that up to the time of the accident he had no knowledge, information, or belief that a deer or buck, or this buck in the rutting season, or any other, ever attacked a person that was not disturbing or interfering with him.

The testimony having closed, the defendant moved that the action be dismissed, the plaintiff nonsuited, and that a verdict be directed in favor of the defendant, on the following grounds:

1. The evidence does not establish a cause of action.

2. It appears that the place where the accident happened was the private grounds of the defendant; that the plaintiff knew that the defendant kept in those grounds this buck and other deer, and went there with full knowledge of all the circumstances.

3. That the plaintiff is chargeable with the same knowledge of the character of the buck as the defendant.

4. That no knowledge by the defendant of the vicious character of the buck has been shown.

5. That if any negligence existed, the plaintiff was guilty of negligence equally with the defendant.

The court denied the motion, and the defendant duly excepted.

The court thereupon charged the jury, and among other things stated as follows: "Some testimony has been produced

here by witnesses who have stated to you the result of their reading in natural history, and the result of the opinion expressed by hunters and sportsmen, as to the general characteristics of the deer; and it is for you to say how much is proved by that evidence. The plaintiff claims to show by that evidence that the deer at a certain season of the year is a dangerous animal. It is for you to say whether, after the cross-examination of the witnesses, you can arrive at that conclusion."

Upon the question of damages, the court, among other things, charged as follows: "In these cases, while, upon the one hand, a jury should guard themselves against the exaggeration which so frequently, and I may say generally, characterizes the statements of the parties in regard to their injuries, and in regard to the damages they have sustained, upon the other hand, when you make up your mind as to the amount really sustained, you are not to be nice in the award of compensation. It should be liberal." To the concluding portion of the charge the defendant excepted.

There was a verdict for the plaintiff for $6,500; and judgment having been rendered thereon, the defendant sued out this writ of error.

Mr. Charles S. Lester for the plaintiff in error.

The liability of the owner of an animal of any description for an injury committed by it is founded upon his negligence, actual or presumed. *Earl* v. *Van Alstyne*, 8 Barb. (N. Y.) 630; Wharton, Negligence, sects. 918–926; *Earhart* v. *Youngblood*, 27 Pa. St. 327; Shearman & Redfield, Negligence, sect. 185; *Munn* v. *Reed*, 4 Allen (Mass.), 431; *Ilott* v. *Wilkes*, 3 Barn. & Ald. 304.

The owner of a domestic animal is not liable for injuries committed by it, unless he had notice that it was accustomed to do mischief. Buller's Nisi Prius, 77; 3 Bla. Com. 153; *Vrooman* v. *Sawyer*, 13 Johns. (N. Y.) 339; *Van Leuven* v. *Lyke*, 1 N. Y. 515.

The distinction in the liability of the owner of different classes of animals does not always depend upon their being *feræ naturæ* or *mansuetæ naturæ*. Deer, when reclaimed and domesticated, cease to be *feræ naturæ*. 2 Kent, Com. 348, 349.

It follows, therefore, that if the deer was a domesticated animal, there was no cause of action made out, because there was no evidence that it had ever before committed any injury, or exhibited any disposition to commit one, nor that the defendant had any knowledge that it possessed a dangerous disposition. The court should have directed a verdict for the defendant.

But if it be claimed that a deer belongs to the same class as lions, bears, and tigers, then, as the plaintiff is chargeable with the same knowledge of its dangerous character as is the defendant, her negligence in going into the enclosure where she knew this deer was confined was such contributory negligence as barred her from recovering. Wharton, Negligence, sect. 926; *Earhart* v. *Youngblood*, *supra*; *Brock* v. *Copeland*, 1 Esp. 203; *Ilott* v. *Wilkes*, *supra*.

The evidence of so-called experts admitted to prove the general character of deer was either inadmissible, because the plaintiff was presumed to have knowledge of such character, or it was incompetent.

The character and disposition of a wild or domestic animal is a fact to be ascertained by experience.

It is only upon questions of science, skill, or trade that opinions of experts are admissible. 1 Greenl. Evid., sect. 440; *Dewitt* v. *Bailey*, 9 N. Y. 375; *Hewlet* v. *Wood*, 55 id. 634; *Bristow* v. *Sequeville*, 5 Exch. 275; *Nelson* v. *Sun Mutual Insurance Co.*, 71 N. Y. 453.

The books of natural history which a witness has read are not of themselves competent evidence. *Commonwealth* v. *Wilson*, 1 Gray (Mass.), 337; *Morris* v. *Lessee of Harmer's Heirs*, 7 Pet. 554; *McKinnon* v. *Bliss*, 21 N. Y. 206; *Collier* v. *Simpson*, 5 C. & P. 73.

The statements of what a witness has read in relation to living animals well known to many people is the merest hearsay.

The court below, in charging the jury that when they make up their minds as to the amount of damages really sustained, they were not to be nice in the award of compensation, but that it should be liberal, in effect told them that the plaintiff was entitled to something more than actual compensation, — that she was, in fact, entitled to exemplary or punitive dam-

ages. The word "liberal" means profuse, generous, ample, something more than strict and just compensation, and it was so understood by the jury. That the word is frequently used by courts and in text-books as synonymous with exemplary, see *Tullidge* v. *Wade*, 3 Wils. 18; *Whipple* v. *Walpole*, 10 N. H. 130; *Tillotson* v. *Cheetham*, 3 Johns. (N. Y.) 64; *Taylor* v. *Church*, 8 N. Y. 463; Sedgwick, Damages, p. 40.

Exemplary damages are only awarded where there has been wilful misconduct, or a positive intention to injure. *Milwaukie & St. Paul Railway Co.* v. *Arms*, 91 U. S. 489; *Cleghorn* v. *New York Central & Hudson River Railroad Co.*, 56 N. Y. 44; *Hamilton* v. *Third Avenue Railroad Co.*, 53 id. 25; *Wallace* v. *Mayor of New York*, 18 How. (N. Y.) Pr. 169. They are never recoverable against the owner of an animal for injuries done by it. *Keightlinger* v. *Egan*, 65 Ill. 235.

Mr. George W. Miller, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Animals *feræ naturæ*, as a class, are known to be mischievous; and the rule is well settled, that whoever undertakes to keep such an animal in places of public resort is or may be liable for the injuries inflicted by it on a party who is not guilty of negligence, and is otherwise without fault.

Compensation in such a case may be claimed of the owner or keeper for the injury; and it is an established rule of pleading that it is not necessary to aver negligence in the owner or keeper, as the burden is upon the defendant to disprove that implied imputation. Cases have often arisen where no such averment was contained in the declaration, and the uniform ruling has been that the omission constitutes no valid objection to the right of recovery. *May* v. *Burdett*, Law Rep. 9 Q. B. 99.

Negligence was not alleged in that case. Trial was had, and the verdict being for the plaintiff, the defendant moved in arrest of judgment that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. Attempt was made by a very able counsel to support the motion, upon the ground that even if the declaration was true, still the injury might have been

occasioned entirely by the carelessness and want of caution on the part of the plaintiff; but Lord Denman and his associates overruled the motion in arrest, and decided that whoever keeps an animal accustomed to attack and injure mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of the person attacked and injured, without any averment of negligence or default in securing or taking care of the animal; and the Chief Justice added, what it is important to observe, that the gist of the action is the *keeping* of the animal after knowledge of its mischievous propensities.

Precedents both ancient and modern, it seems, were cited in the argument and were examined by the court, and the learned Chief Justice remarked, that with scarcely an exception they merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. *Jackson* v. *Smithson*, 15 Mee. & W. 563; *Popplewell* v. *Pierce*, 10 Cush. (Mass.) 509.

Injuries of a serious character inflicted by a mischievous deer, which the defendant company kept in their park, were received by the plaintiff at the time and place alleged, for which she claims compensation of the company. By the declaration it appears that the company is the owner and proprietor of the Congress Spring at Saratoga in the State of New York, whose waters have become celebrated for their medicinal qualities and the source of great gains and profits to the company. Among other things the plaintiff alleges that the spring had for a long time been kept open and accessible to visitors, the public being invited in various forms to patronize its waters, and that to make it more inviting and attractive the company had opened in connection therewith an extensive park, ornamented with fountains, trees, shrubbery, and flowers, through which extensive gravelled walks have been constructed for the use and comfort of those who resort there to use the mineral waters and to enjoy the landscape; that the company, in order further to enhance the attractions of the park, had obtained and in some degree domesticated several wild deer, and among them a large and powerful buck, with large horns and of vicious character and habits, which were well known

to the defendant company, their officers and agents, and the residents of the village.

Actual knowledge by the company of the mischievous character of the animal is alleged by the plaintiff, and she avers that the vicious animal on the day named, to wit, the 18th of October, 1870, was permitted to run at large in the park, and that she on that day visited the spring to partake of its waters, and that while she was peaceably proceeding along one of the walks in the park she was fiercely attacked by the mischievous buck and greatly injured, bruised, and lacerated, as more fully set forth in the declaration.

Service was made; and the defendant company appeared and pleaded: 1. The general issue. 2. That the damage and injury suffered by the plaintiff were occasioned by her own fault in neglecting to obey the rules and regulations of the company. On motion of the plaintiff a jury was impanelled, and the parties went to trial, which resulted in a verdict and judgment in favor of the plaintiff. Exceptions were filed by the defendant company, and they sued out the pending writ of error.

Since the cause was entered here the defendant company has filed the following assignments of error: 1. That the court, in view of the evidence, should have directed a verdict for the defendant. 2. That the court erred in admitting the questions to the two witnesses called by the plaintiff as experts. 3. That the court erred in the instructions given to the jury in respect to the question of damages.

Certain animals *feræ naturæ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals; but inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated, the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with knowledge of the vicious and mischievous propensity of the animal. Wharton, Negligence, sect. 922; *Decker v. Gammon*, 44 Me. 322.

Three or more classes of cases exist in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others, the required allegations and proofs varying in each case. 2 Bla. Com., per Cooley. 390.

Owners of wild beasts or beasts that are in their nature vicious are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large.

Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *feræ naturæ* the owner is liable to an action of damage if it get loose and do harm. 1 Hale P. C. 430; *Worth* v. *Gilling*, Law Rep. 2 C. P. 3.

Owners are liable for the hurt done by the animal even without notice of the propensity, if the animal is naturally mischievous, but if it is of a tame nature, there must be notice of the vicious habit. *Mason* v. *Keeling*, 12 Mod. Rep. 332; *Rex* v. *Huggins*, 2 Ld. Raym. 1574.

Damage may be done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief. *Vrooman* v. *Sawyer*, 13 Johns. (N. Y.) 339; *Buxendin* v. *Sharp*, 2 Salk. 662; *Cockerham* v. *Nixon*, 11 Ired. (N. C.) L. 269.

Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that if they are rightfully in the place where the injury is inflicted the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensity. *Jackson* v. *Smithson*, 15 Mee. & W. 563; *Van Leuven* v. *Lyke*, 1 N. Y. 515; *Card* v. *Case*, 5 C. B. 632; *Hudson* v. *Roberts*, 6 Exch. 697; *Dearth* v. *Baker*, 22 Wis. 73; *Cox* v. *Burbridge*, 13 C. B. N. S. 430.

It appears by the bill of exceptions that the plaintiff on the morning of the day of the injury entered the park belonging to the defendant company; that after drinking of the water of the spring she walked through the grounds and that she met the mischievous deer; that he attacked her, goring and striking her with his head and horns, whereby she was thrown down and greatly injured and put to great suffering and expense, as more fully set forth in her testimony. On her cross-examination she testified that she had been in the habit of visiting the park to enjoy the water and the pleasure of the walk; that she had noticed the deer at an earlier period and had often seen them running about on the lawn; that she had seen persons playing with them on different occasions; and that she had noticed the signboard posted in the park containing the notice, "Beware of the buck." Another witness called by the plaintiff testified that the park contains about eleven acres; that there were nine deer in the park, among which were three bucks, the oldest being four years old; that he first heard that the buck was ugly when the plaintiff was attacked and knocked down; that notices were put up at different places in the park a year or two before, cautioning visitors not to tease or worry the deer; and that he had no knowledge or belief prior to the accident that the buck or any other of the herd would attack any person if they were not disturbed. Expert witnesses were called by the plaintiff, and they gave it as their opinion that the male deer in the fall of the year is a dangerous animal.

Five witnesses were examined in behalf of the plaintiff; but the bill of exceptions does not show that the defendant company gave any evidence in reply, nor is it stated that the whole testimony introduced by the plaintiff is reported. When the evidence was closed, the defendant moved that the action be dismissed, that the plaintiff be nonsuited, and that the court direct the jury to return a verdict in favor of the defendant.

Discussion of the first two propositions involved in the motion is wholly unnecessary, for two reasons: 1. Because the jurisdiction of the court was beyond doubt, and the record shows that the suit was well brought. 2. Because it is not competent for the Circuit Court to order a peremptory nonsuit in any case.

Circuit courts cannot grant a nonsuit, but the defendant at the close of the plaintiff's case may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to maintain the action, and to direct a verdict for the defendant. In considering the motion the court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true, and the rule is that the motion will be denied unless the court is of the opinion that in view of the whole evidence, and of every inference the law allows to be drawn from it, the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor. *Merchants' National Bank* v. *State National Bank*, 3 Cliff. 205; *Same* v. *Same*, 10 Wall. 655.

Tested by that rule, which is everywhere admitted to be correct, it is clear that the motion of the defendant was properly denied, for several reasons: 1. Because the proof of injury was overwhelming. 2. Because the allegation that the animal was vicious and mischievous was satisfactorily proved. 3. Because the evidence to prove that the defendant company had knowledge of the vicious and mischievous propensity of the animal was properly left to the jury, and it appearing that the Circuit Court overruled the motion for a new trial, the court here cannot disturb the verdict except for error of law. 4. Because the cause of action in the case arises not merely from the keeping of the animal, but from the keeping of the same after knowledge of its vicious and mischievous propensities. 5. Because the evidence is plenary that the plaintiff was rightfully in the place where she was injured, and that the owners of the vicious animal, inasmuch as the evidence tended to show that they had knowledge of its mischievous propensities, are justly held liable for the consequences. *Stiles* v. *Navigation Company*, 33 L. J. N. S. 311; *Oakes* v. *Spaulding*, 40 Vt. 347; *Sarch* v. *Blackburn*, 4 C. & P. 297; *Same* v. *Same*, 1 Moo. & M. 505; *Besozzi* v. *Harris*, 1 Fos. & Fin. 92.

Whoever keeps an animal accustomed to attack or injure mankind, with the knowledge of its dangerous propensities, says Addison, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of the animal, the gist of the action being the keeping of

the animal after knowledge of its mischievous disposition. Addison, Torts (ed. 1876), 283; *Dickson* v. *McCoy*, 39 N. Y. 400; *Applebee* v. *Percy*, Law Rep. 9 C. P. 647; Lead. Cas. Torts, 489.

Witnesses are not ordinarily allowed to give opinions as to conclusions dependent upon facts not necessarily involved in the controversy; but an exception to that rule is recognized in the case of experts, who are entitled to give their opinions as to conclusions from facts within the range of their specialties, which are too recondite to be properly comprehended and weighed by ordinary reasoners. 1 Wharton, Evid., sect. 440.

Men who have made questions of skill or science the object of their particular study, says Phillips, are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case. Medical men, for example, may give their opinions not only as to the state of a patient they may have visited, or as to the cause of the death of a person whose body they have examined, or as to the nature of the instruments which caused the wounds they have examined, but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial. Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art, or particular trades may give their opinions as witnesses in matters pertaining to their professional calling. 1 Phil. Evid. (ed. 1868) 778.

It must appear, of course, that the witness is qualified to speak to the point of inquiry, whether it respects a patented invention, a question in chemistry, insurance, shipping, seamanship, foreign law, or of the habits of animals, whether *feræ naturæ* or domestic.

On questions of science, skill, or trade, or others of like kind, says Greenleaf, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. 1 Greenl. Evid., sect. 400; *Buster* v. *Newkirk*, 20 Johns. (N. Y.) 75.

Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. *D. & C. Steam Towboat Co.* v. *Starrs*, 69 Pa. St 8(*Page* v. *Parker*, 40 N. H. 48; *Tucker* v. *Massachusetts Central Railroad*, 118 Mass. 546.

Experts may be examined, says Justice Grier, to explain the terms of art, and the state of the art at any given time. Speaking of controversies between a patentee and an infringer, he says that experts may explain to the court and jury the machines, models, or drawings exhibited in the case. They may point out the difference or identity of the mechanical devices involved in their construction, and adds, that the maxim "*cuique in sua arte credendum*" permits them to be examined in questions of art or science peculiar to their trade or profession. *Winans* v. *New York & Erie Railroad Co.*, 21 How. 88; *Ogden* v. *Parsons et al.*, 23 id. 167.

Even if the witnesses are not properly to be regarded as experts, the court is of the opinion that the testimony was properly admitted as a matter of common knowledge.

Well-guarded instructions were given to the jury on the subject, as appears from the transcript. Their attention was directed to the testimony, and they were told that it was for them to determine its weight, which shows that the defendant has no just ground of complaint.

Complaint is also made by the defendant that one sentence of the charge of the court in respect to the damages is erroneous. When you have made up your mind, said the judge, as to the amount really sustained, you are not to be nice in the award of compensation. It should be liberal.

Exception was taken to that remark without request for a different instruction, or that it should be qualified or explained in any way. Before that remark was made the judge cautioned the jury against giving credence to any extravagant statement

of the injuries received, and then told them that when they had made up their minds as to the amount, meaning the amount of the injury really sustained, they should not be nice in the award of compensation, adding, as if to qualify the antecedent caution given in favor of the defendant, that it should be liberal.

In examining the charge of the court for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions. *Magniac and Others* v. *Thompson*, 7 Pet. 348.

Instructions given by the court at the trial are entitled to a reasonable interpretation, and if the proposition as stated is not erroneous, they are not as a general rule to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party. *Castle* v. *Bullard*, 23 How. 172.

Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained. *Locke* v. *United States*, 2 Cliff. 574; *Smith* v. *McNamara*, 4 Lans. (N. Y.) 169.

Requests for such a purpose may be made at the close of the charge, to call the attention of the judge to the supposed error, inaccuracy, or ambiguity of expression; and where nothing of the kind is done, the judgment will not be reversed, unless the court is of the opinion that the jury were misled or wrongly directed. *Carver* v. *Jackson, ex dem. Astor et al.*, 4 Pet. 1; *White* v. *McLean*, 57 N. Y. 670.

None of the exceptions can be sustained, and there is no error in the record.

Judgment affirmed.

EVANSTON v. GUNN.

1. A party specifying his objection to the admission of evidence must be considered as waiving all others, or as conceding that there is no ground upon which they can be maintained.
2. The record kept by a person employed in the Signal Service of the United States, whose public duty it is to record truly the facts therein stated, is competent evidence of such facts.
3. During its change from a town to a village organization, under the statute of Illinois of April 10, 1872, the corporation is not released from the obligation to exercise the power with which it is invested to keep its streets and sidewalks in a safe condition. For neglect in that regard it is liable to a party who thereby sustains special damages.
4. Inasmuch as the village succeeds to all the property and funds as well as to the liabilities of the town, and has power to borrow money to provide for improvements rendered necessary by any casualty or accident happening after the annual appropriation, it cannot, when sued by such party, set up that its board of trustees were unauthorized to make that appropriation for the year in which the plaintiff's injury occurred, nor that the board and the other officers of the village were prohibited by law from adding to the corporate expenditures in any one year an amount above that provided for in the annual appropriation bill for that year.
5. Where the charge to the jury taken as a whole fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of trespass on the case brought by Jessie Gunn against the village of Evanston, Ill., to recover damages which she had sustained April 22, 1873, by reason of the alleged neglect of duty on the part of the defendant.

The old town of Evanston was in 1863 incorporated under the General Laws of 1845, and the defendant, its successor, became incorporated as a municipal corporation, and assumed its present name, Oct. 15, 1872, under an act of the General Assembly, entitled "An Act to provide for the incorporation of cities and villages," approved April 10, 1872.

The laws of 1845 authorized the corporation, among other things, to keep open and in repair its streets and alleys by making pavements or sidewalks as to it might seem needful, and to levy and collect a tax for the purpose, and provided that it should be its duty to cause all its streets and alleys, and

all the public roads passing from and through it for one mile from the centre thereof, to be kept in good repair.

The corporation, to fulfil these duties, was authorized to require male residents to work on the roads, and it could make appropriations from the annual tax levy. The duties of a street commissioner were to be prescribed by ordinance. An ordinance of the town of Evanston declared them to be "to keep in repair streets, ditches, drains, crosswalks, and sidewalks, under the direction of the board of trustees."

The act of April 10, 1872, under which the new organization was effected, confers the following among other powers: "To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same; to prevent and remove encroachments or obstructions upon the same; to construct and keep in repair culverts, drains, sewers, and cesspools, and regulate the use thereof; to construct and keep in repair bridges, viaducts, and tunnels, and regulate the use thereof."

The act also authorizes the assessment and levy of taxes for corporate purposes; the making of annual appropriations to defray all necessary expenses and liabilities; and the borrowing of money under certain contingencies, for the same general purposes. It further provides that when a majority of the votes of the town cast at an election to be held for that purpose shall be for a village organization, "such town shall, from and henceforth, be deemed to be duly incorporated as a village under this act; but the town officers then in office shall continue as like officers of such village until their successors shall be elected or appointed under the provisions of this act."

The election for village officers is held on the third Tuesday in April of each year, and the fiscal year commences at that date.

It is further provided that "from the time of such change of organization, the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and be applicable to any such city or village,

the same as if such change of organization had not taken place. All ordinances, resolutions, and by-laws in force in any city or town when it shall organize under this act shall continue in full force and effect until repealed or amended, notwithstanding such change of organization; and the making of such change of organization shall not be construed to effect a change in the legal identity, as a corporation, of such city or town."

Sect. 12 provides: "All rights and property of every kind and description, which were vested in any municipal corporation under its former organization, shall be deemed and held to be vested in the same municipal corporation upon its becoming incorporated under the provisions of this act; but no rights or liabilities, either in favor of or against such corporation, existing at the time of so becoming incorporated under this act, and no suit or prosecution of any kind, shall be affected by such change."

It is further provided that the board of trustees "shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to pay all necessary expenses and liabilities of such corporation. . . . No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make such has been first sanctioned by a majority of the legal voters of such village, either by a petition signed by them, or at a general or special election duly called therefor." "Neither the board of trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year any thing over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditures for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill: *Provided, however*, that nothing herein contained shall prevent the board of trustees from adding, by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident happening after such annual

appropriation is made. The board of trustees may, by a like vote, order the president of the board of trustees and finance committee to borrow a sufficient amount to provide for the expense necessary to be incurred in making any improvements, the necessity of which has arisen as is last above mentioned, for a space of time not exceeding the close of the next fiscal year, which sum, and the interest, shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein." . . .

The plaintiff was a teacher in the public schools of the village of Evanston, and resided within its corporate limits on the west side of Sherman Avenue, where there was no sidewalk on the usual line. In the avenue, which is one hundred feet wide, and at a distance of some twenty feet from its west side, there was a ditch or drain running north and south through the entire limits of the village, and which the street commissioner, after the organization of the old town, had, by authority of its trustees, deepened and sided up with planks, and constructed, at the public expense, street-crossings so as to pass over it. Without objection on his part, property holders, in the summer of 1871, had covered it with planks for a sidewalk, and it was subsequently used as such. As the plaintiff was passing along the avenue in the morning, on her way to school, she fell with her right leg into a hole in the cover of the drain, which was from six to eight inches in width and from two to four feet in length. She sustained severe injuries to her spine and hip-joint, which will probably disable her for life. She was aware of the existence of the hole, but its exact location could not, by reason of the snow which covered it, be distinguished, and she was endeavoring to avoid it when the accident occurred.

The hole was made by a runaway team in the fall of 1872, and was then insufficiently covered by the owner of a lot in the neighborhood. The planks were again broken at that place, and so remained for several weeks before the plaintiff was injured. In the mistaken impression that an ex-street-commissioner was still in office, parties had notified him of its condition, and there was evidence tending to show that the village officers were also aware of it.

The plaintiff, for the purpose of showing the direction and velocity of the wind and the falling of snow in the morning in question and the previous evening, offered in evidence the record made by a person employed at Chicago by the United States Signal Service. The defendant objected, because there was no law authorizing the record to be used in evidence, and because the same was not competent testimony. The court overruled the objection, and the defendant excepted. The record was then read, from which it appeared that a snow-storm occurred on the evening of April 21, 1873, and the wind blew at the rate of twenty miles an hour; that the storm continued until the following morning, when the wind blew at the rate of twenty-four miles an hour; that snow fell at that time sufficient to make $\frac{17}{100}$ of an inch in melted snow. It was also proved that Evanston was located ten miles north of Chicago, and that the snow-storm was as severe there as in that city.

The defendant introduced evidence tending to prove that from the organization of the village up to June, 1873, no appropriations had been made by it under said act of April 10, 1872; that the ditch was originally dug in the year 1855 by the drainage commissioners incorporated as such under the laws of the State; that by actual measurement the distance was thirty feet and five inches from the gate in front of the plaintiff's residence to the covered drain, and that the latter was six feet five inches wide; that the distance from the west line of the ditch to the railing of the park between the ditch and her house was three feet; that the passage left for a side-walk between the park and her house was nine feet; that the ground there was hard, dry, and sodded, and that there was at the time of the accident no obstacle to prevent her from passing along that passage to the school where she taught; that the hole in the covered drain was six inches from the east side thereof; that the distance from the top of the cover to the bottom of the drain was four feet; that the trustees of the old town had never by any recorded proceedings authorized said sewer to be covered over nor a sidewalk to be laid on the top thereof; that no street commissioner had ever by any direct act consented that the cover to said sewer

should be built or used for the purposes of a sidewalk, although at the time the work was done the then commissioner was aware that the lot-owners doing it expected that the cover would be used as a sidewalk, and that he planked it at the intersecting streets and alleys at the public expense.

The court charged the jury, that if the defendant, when it came into corporate existence, found the ditch as a part of the drainage system of that locality running along one of the streets, it was bound in some way to protect the public against danger from said ditch, and that it made no difference for the purpose of the case whether the ditch was a drain formed by nature and existing from time immemorial, or had been created by artificial means only a few years prior to the formation of the corporation; that if it was rightfully there when the corporation came into existence, then it was bound to accept it, and provide for the safety of its citizens against it, and to keep it in repair; that the fact that the corporation had changed its organic law but a few months prior to the accident, and had not yet run the term of its municipal year when it could make an appropriation under the law under which it was then existing, did not relieve it from liability to keep the street in repair. The court also instructed the jury at large as to any contributory negligence on the part of the plaintiff.

There was a verdict for the plaintiff for $6,500, and judgment having been rendered thereon, the defendant sued out this writ of error.

Mr. George O. Ide for the plaintiff in error.
Mr. Wirt Dexter, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the trial, not because it had not been properly made, identified, and proved, but for the alleged reason that "there was no law authorizing such records to be used in evidence, and because it was not competent testimony." The defendants having thus specified their objection, it must be considered that all others were waived, or that there was no ground upon which others could stand. *Berks & Dauphin*

Turnpike Co. v. *Myers*, 6 Serg. & R. (Pa.) 12; *Chicago & Alton Railroad Co.* v. *Morgan*, 69 Ill. 492. We have then only to consider the objections that were made, — the only ones that appear in the bill of exceptions, — and they present the question whether the record, conceding it to be properly proved, was competent evidence. It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sects. 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the States and Territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence "official registers or records kept by persons in public office in which they required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." Taylor, Evid., sect. 1429; 1 Greenl. Evid., sect. 483. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl Evid., sect. 496. Nor need they be kept by a public officer

himself, if the entries are made under his direction by a person authorized by him. *Galt* v. *Galloway*, 4 Pet. 332. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned. *De Armond* v. *Nesmith*, 32 Mich. 231; *Gurney* v. *House*, 9 Gray (Mass.), 404; *The Catharine Maria*, Law Rep. 1 Ad. & Ec. 53; *Clicquot's Champagne*, 3 Wall. 114. We think, therefore, that there was no error in admitting the record kept by the person employed for the purpose by the United States Signal Service.

The exceptions to the charge, though numerous, in our opinion point to no error. Without going through in detail the statute under which the village was organized and the powers conferred upon it, it is enough to say that it had ample authority to keep the streets and walks in a safe condition at all times for passage. And the power carried with it the duty of exercising it. Nothing could have been a more palpable violation of that duty than permitting the continuance of such a trap as that into which the plaintiff below fell. And this duty was not suspended during the changes from a township to a village organization. The identity of the corporation was not destroyed by the change, and its obligations in regard to the streets, avenues, sidewalks, drains, &c., continued in full force. The fact that the board of trustees of the village were not authorized to make their annual appropriation for the year in which the plaintiff's injury occurred, if it was a fact, and that they, as well as every department and officer of the corporation, were prohibited by law from adding to the corporate expenditures in any one year any thing above the amount provided for in the annual appropriation bill for that year, is quite immaterial. The power to borrow money sufficient to provide for making any improvements, the necessity for which was caused by any casualty or accident happening after the annual appropriation, was expressly given. Besides, the village succeeded to all the property and funds of the township, as well as to its liabilities. It was organized in October, 1872, and the accident to the plaintiff occurred on the 22d of April, 1873, six months afterwards.

We see no error in the instruction given to the jury respecting contributory negligence of the plaintiff. It was full, — all

the case demanded, — and strictly accurate. Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled. Upon the whole, we think that the case was submitted in a manner of which there is no just cause of complaint.

Judgment affirmed.

LYON v. POLLOCK.

1. A., at the commencement of the late rebellion, owned property in San Antonio, Texas, consisting principally of real estate and stock in a gas company. Apprehending that his life was in danger in consequence of his avowed hostility to secession, he fled from the country, and, by a power of attorney, authorized B. to sell the property for whatever consideration and upon such terms as he might deem best, and to execute all proper instruments of transfer. B. took possession of the property, which he retained until July, 1865, when he gave the charge of it, with the business and papers in his hands, to C. A. thereupon wrote to C., "I wish you to manage [my property] as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." *Held*, that C. was thereby authorized to contract for the sale of the real estate, but not to convey it.
2. A deed executed to a purchaser, though invalid as a conveyance, may be good as a contract for the sale of the property described therein.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The appellant, Lyon, in 1873, recovered judgment in the Circuit Court of the United States against the appellees, Pollock and wife, in an action for two parcels or lots of land situated in the city of San Antonio, in the State of Texas. Thereupon the appellees brought the present suit on the equity side of the court to enjoin the enforcement of the judgment, and to compel a conveyance to them of the title to the land; or, if that relief could not be granted, to obtain a decree for the value of their improvements, in accordance with a statute of the State.

The bill of complaint states, as grounds for relief, that the judgment was obtained upon the trial of the legal title, and

that their rights are of an equitable nature, constituting an equitable title to the land. It sets forth that on the 24th of August, 1865, Lyon, being owner of the lots, executed an instrument, a copy of which is appended and made part of the bill, authorizing one I. A. Paschal to sell any and all real estate of which he, Lyon, was then seised in the county of Bexar, in Texas, and that the premises in controversy are a portion of this property; that previously, and up to the 1st of July, 1865, one W. A. Bennett had been the attorney and agent of Lyon, having full power to manage, control, and sell all or any portion of his property, real or personal; that about this time Bennett transferred the business of his agency to Paschal, and communicated the fact to Lyon; that the latter thereupon executed the instrument mentioned; that after this transfer and the delivery of the instrument, Paschal was treated and recognized by him as his duly authorized agent and attorney; and, as such, he sold the premises in controversy to the complainants in October, 1865, for the sum of $425, and executed a conveyance to them.

The bill further states that Lyon subsequently made no claim to the lots, but acquiesced in their sale, and did not attempt to exercise any control over them, nor pay any taxes on them; that the complainants at once took possession of the lots, and have since been in their undisturbed use and enjoyment, claiming the same as their own, and have paid the State, city, and county taxes, and have made permanent improvements on them of the value of $6,250; that the lots sold for their full value; and that Paschal used the money received from the sale, with Lyon's consent, in part payment of assessments on stock owned by him in the San Antonio Gas Company, a corporation existing in the county of Bexar.

The instrument mentioned in the bill as authorizing Paschal to sell Lyon's real estate is a letter of Lyon, of which the following is a copy, omitting immaterial portions: —

"MONTERREY, Aug. 24, 1865.

"I. A. PASCHAL:

"MY DEAR SIR, — I am just in receipt of a letter from Mr. Bennett, informing me that he has placed all my papers for safe-keeping in your possession. In better or safer hands he could not

have given them. The position you have occupied during the past four years of the war is a very enviable one, as glorious as it has been dangerous. I congratulate you upon the issue. I am sure you have no reason to regret your decision to abide by the Union. . . . I am unable to go to San Antonio at present. My family are sick in the North, and demand my presence there. Mr. Kinney's death leaves a large business in my hands to be settled. I wish you to manage as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate. I shall be glad if you find time to write to me. If you will, give me a description of affairs as they exist at present. I shall probably remain here two months yet. . . . I enclose a letter for my wife. It is impossible to send letters by Matamoras. The road has been blockaded for a long time. If you have a regular mail, I shall be greatly obliged if you will mail this letter; if no mail, will you do me the favor to send by private hands to New Orleans?

"Most respectfully yours,

"I. L. LYONS."

The previous power of attorney to W. A. Bennett authorized him to take charge of and control all Lyon's property of every kind, real and personal, in the county of Bexar, in Texas, and to sell and convey the same upon such terms and upon such conditions as he might deem best, and to collect and receipt for all debts, rents, and profits due or to become due to Lyon, and to represent him in all matters relating to the stock of the gas company.

The answer of Lyon to the bill admits that on the 24th of August, 1865, he was the owner of the lots in controversy; that prior to the 1st of August of that year, W. A. Bennett was his lawful agent and attorney, authorized to manage his property, and sell it or any part of it; and that prior to the 24th of that month he transferred his papers to Paschal for safe-keeping; but it denies that the letter of attorney from him to Bennett contained any power of substitution. It admits the writing of the letter by him to Paschal acknowledging the receipt of Bennett's letter, informing him of the transfer of the papers; but denies that he conferred, or intended by it to confer, any authority to sell the property, or that he afterwards

treated or recognized Paschal as his agent or attorney with such authority. It also denies that Lyon ever ceased to regard the lots as his property, or that he has ever acquiesced in their sale; and avers that he was prevented from taking possession of the property after the sale only from fear of bodily harm. It also avers ignorance by Lyon of the payment of taxes on the property or of the alleged improvements; and that the payment of the taxes, and the improvements, if made, were without his knowledge or consent.

In explanation of his absence from Texas, the answer states that, when the rebellion broke out, it was known that he was a Union man, opposed to the secession movement, and that his life was in consequence threatened by a secret combination of men known as "the Knights of the Golden Circle," and that he was compelled to leave the country secretly and in haste; that after the war was at an end he believed that his life would have been in imminent danger had he returned to Texas and attempted to recover his property. It avers that if the money received by Paschal were appropriated for the payment of assessments upon stock of the San Antonio Gas Company, such disposal of it was unauthorized and without his knowledge or consent. It also refers to the judgment at law recovered by him in the Circuit Court of the United States for the lots in controversy, and insists that it settled all questions between the parties as to the property in suit.

To the answer a replication was filed and proofs were taken, which showed that rumors had reached Lyon as early as 1867 that sales of some of his real estate had been made by Paschal, and that assessments had been levied on his stock in the gas company, and generally tended to establish the allegations of the bill. In the opinion of the court below they sufficiently established the equitable right of the complainants to a conveyance of the premises from Lyon. A decree directing such conveyance, with a perpetual injunction against the enforcement of the judgment for the possession of the lands, was accordingly entered, from which the present appeal is taken.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the appellant.

No counsel appeared for the appellees.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

This case turns upon the construction given to the letter of Lyon to Paschal, of the 24th of August, 1865. That letter clearly did not authorize the execution of a conveyance by Paschal in the name of Lyon to the purchaser. Its insufficiency in that respect was authoritatively determined in the action at law for the lands; the instrument executed by Paschal as the deed of Lyon being held inoperative to pass the legal title. The question now is, was the letter sufficient to authorize a contract for the sale of the lots? To determine this, and give full effect to the language of the writer, we must place ourselves in his position, so as to read it, as it were, with his eyes and mind. It appears from his answer, as well as his testimony, that he was in great danger of personal violence in San Antonio, shortly after the commencement of the rebellion, owing to his avowed hostility to secession, or at least that he thought he was in such danger. He apprehended that his life was menaced, and was in consequence induced to flee the country. He possessed at the time a large amount of property, real and personal, in San Antonio. This he confided to the care of his partner, Bennett, to whom he gave a power of attorney, authorizing him to take charge of and control the same, and sell it for whatever consideration and upon such terms as he might judge best, and execute all proper instruments of transfer; and also to collect and receipt for debts due to him. Bennett took possession of Lyon's property and managed it until July, 1865, when he transferred it, with the business and papers in his hands, to Paschal, and at once informed Lyon by letter of the transfer. It was under these circumstances that the letter of Lyon to Paschal, which is the subject of consideration, was written. Its language is: "I wish you to manage [my property] as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate."

Situated as Lyon then was, a fugitive from the State, it could hardly have been intended by him that if propositions

to purchase his property or any part of it were made to Paschal, they were to be communicated to him, and to await his approval before being accepted. He was at the time at Monterey, in Mexico, and communication by water between that place and San Antonio was infrequent and uncertain; and he states himself that it was impossible to send letters by Matamoras, as the road was blockaded. Writing under these circumstances, we think it clear that he intended by his language, what the words naturally convey, that if an opportunity to sell his property presented itself to Paschal, he should avail himself of it and close a contract for its sale.

His subsequent conduct shows, or at least tends to show, that such was his own construction of the letter, and that he approved, or at least acquiesced in, the disposition made of his property. He must have been aware, from the laws of the State, which he is presumed to have known, that taxes were leviable upon his property, and that unless they were paid the property would be sold for their payment; yet he confessedly took no steps from 1865 to 1873 to meet them, and thus prevent a forced sale of his property; a course perfectly natural if it be conceded that the property was in charge of an agent, with power to manage and sell it as his judgment might dictate. His indifference, also, after rumors reached him that a sale of his property had been made by Paschal in 1867, can scarcely be explained upon any other hypothesis. The same may be said of his inattention to the payment of the assessments upon his stock in the San Antonio Gas Company, of which he had received intimations. From the time Paschal took charge of his property, in 1865 to 1873, a period of eight years, he certainly manifested, if his own story be accepted, a most extraordinary want of interest in regard to his real property, of great value, situated in an unfriendly community, subject to taxation, and liable to be sold if the taxes were not promptly paid; and also in regard to his personal property, consisting of shares in the San Antonio Gas Company, of great value, liable to assessments, and to sale if the assessments were not paid when due. It is much more reasonable to suppose that he knew of the sales made of the real property and of the assessments on the shares, and that he was undisturbed by

the reports which reached him, because he considered that the sales were made and the assessments paid from the proceeds, by his authorized attorney.

The testimony of Bennett tends also to corroborate this view. He states that he knew from his correspondence with Lyon that he treated Paschal as his agent for the sale of his property. The conduct of Lyon, as expressive almost as any language which he could use, cannot, of course, change the construction to be given to the words contained in his letter to Paschal, but it tends to strengthen the conclusion as to the intention of the writer.

Holding the letter to confer sufficient authority to contract for the sale of Lyon's real property in San Antonio, there can be no doubt of the right of the complainants to the relief prayed. The deed executed to them by Paschal in the name of Lyon, though invalid as a conveyance, is good as a contract for the sale of the property described in it; and is sufficient, therefore, to sustain the prayer of the bill for a decree directing Lyon to make a conveyance to them and enjoining the enforcement of the judgment at law.

Decree affirmed.

NOTE. — In *Lyon* v. *Hernandez*, which was argued by the same counsel as was the preceding case, MR. JUSTICE FIELD, in delivering the opinion of the court, remarked: This case involves the same question decided in *Lyon* v. *Pollock* (*supra*, p. 668), and on the authority of that decision the decree herein is affirmed.

PERRIS v. HEXAMER.

The right of an author or a publisher, under the copyright law, is infringed only when other persons produce a substantial copy of the whole or of a material part of the book or other thing for which he secured a copyright. Where, therefore, the owner of a copyright for maps of certain wards of "the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference," brought his bill to restrain the publication of similar maps of the city of Philadelphia. *Held*, that the bill could not be sustained.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court

Mr. J. Van Santvoord and *Mr. J. J. Coombs*, for the appellants, cited *Jollie* v. *Jacques*, 1 Blatchf. 618; *Green* v. *Bishop*, 1 Cliff. 199; *Drury* v. *Ewing*, 1 Bond, 540; *Folsom* v. *Marsh*, 2 Story, 100; *Emerson* v. *Davies*, 3 id. 768; *Gray* v. *Russell*, 1 id. 11; *Story's Executors* v. *Holcombe*, 4 McLean, 309; *Daly* v. *Palmer*, 6 Blatchf. 256.

Mr. Joshua Pusey for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The complainants are the owners of a copyright of a series of maps of the city of New York, prepared for the use of those engaged in the business of fire insurance, the title of which is as follows: "Maps of the city of New York, surveyed under the direction of insurance companies of said city, by William Perris, civil engineer and surveyor, 1852. Volume 1 comprising the 1st, 2d, 3d, and 4th wards. The maps exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference." The maps were made after a careful survey and examination of the lots and buildings in the enumerated wards of the city, and were so marked with arbitrary coloring and signs, explained by a reference or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks. They are useful contrivances for the despatch of business, but of no value whatever except in connection with the identical property they purport to describe.

The defendant made the necessary examination and survey, and published a similar series of maps of Philadelphia. At first he used substantially the same system of coloring and signs, and consequently substantially the same key that had been adopted by the complainants, but afterwards he changed his signs somewhat, and, of course, changed his key.

The question we are to consider is whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he

has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced. It needs no argument to show that the defendant's maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainants represent New York. They are not only not copies of each other, but they do not convey the same information.

The complainants have no more an exclusive right to use the form of the characters they employ to express their ideas upon the face of the map, than they have to use the form of type they select to print the key. Scarcely any map is published on which certain arbitrary signs, explained by a key printed at some convenient place for reference, are not used to designate objects of special interest, such as rivers, railroads, boundaries, cities, towns, &c.; and yet we think it has never been supposed that a simple copyright of the map gave the publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purposes of his delineations. That, however, is what the complainants seek to accomplish in this case. The defendant has not copied their maps. All he has done at any time has been to use to some extent their system of arbitrary signs and their key.

Decree affirmed.

ORLEANS v. PLATT.

1. Where, upon the undisputed facts of the case, the plaintiff is entitled to recover, it is not error for the court to instruct the jury to find for him.
2. Where the testimony is all one way, a party is not entitled to instructions which assume that it is otherwise.
3. Where, pursuant to the authority vested in him by chapter 907 of the laws of New York, passed May 18, 1869, and the several laws amendatory thereof, the county judge renders judgment declaring that the conditions have been performed whereon a town in the county can lawfully subscribe for shares of the capital stock of a railroad company in that State, and issue its bonds to pay therefor,—*Held*, that the judgment, until reversed by a higher court, is conclusive.

4. In May, 1871, certain parties claiming to be a majority of the tax-payers, and to own the greater part of the taxable property of a town in New York, petitioned the proper county judge for an order that its bonds, to the amount of $80,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of A., a railroad company. After hearing, he, July 1, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. Application was thereupon made by sundry tax-payers to the Supreme Court for a writ of *certiorari*, which was allowed, Sept. 30, 1871, and served upon him. The proper return was made. June 27, 1872, the Supreme Court affirmed the judgment. In July following, the case was taken to the Court of Appeals, where, solely upon the ground that he had refused the application of tax-payers to withdraw their signatures from the petitions, which, had it been granted, would have reduced the numbers and the taxable property represented below the statutory requirement, the previous judgment was, in February, 1873, reversed, with directions to dismiss the proceeding. April 3, 1872, the commissioners subscribed for eight hundred shares of the stock of A., and on the next day issued and delivered in payment one hundred and sixty of the bonds of the town of $500 each, and thereupon received from A. scrip for the stock, which the town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. A., Feb. 26, 1872, and May 31, 1873, entered into contracts with another railroad company, and at the latter date delivered as collateral security for the fulfilment of both contracts all the bonds to B., with authority to him to sell them and pay over the proceeds to the latter company. Feb. 4, 1874, the plaintiff purchased some of the bonds in good faith for a valuable consideration. He subsequently brought suit against the town to recover the amount due on the coupons. *Held*, that the plaintiff is entitled to recover.

5. *County of Warren* v. *Marcy* (97 U. S. 96) cited and approved.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

Mr. Levi H. Brown for the plaintiff in error.

Mr. Francis Kernan, *contra*.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This suit was brought upon interest coupons belonging to alleged bonds of the town of Orleans, in the State of New York. There are thirteen assignments of error in the record. Ten of them relate to the admission or rejection of evidence. All these ten have been pressed upon our attention; but we think there is nothing in them. We shall, therefore, pass them by without giving to either of them special consideration. The proceedings

of the county judge touching the issuing of the bonds, and the bonds themselves, were sought to be excluded. This proceeded upon a misconception of the law of evidence. The plaintiff had a right to exhibit his case. These documents, according to his view, were links in his chain of title to recover. To shut them out would have been to condemn him unheard, and to give judgment against him without trial. The admissibility of testimony under such circumstances, and its effect after it is admitted and all the other evidence is in, are very different questions.

The twelfth assignment is that the defendant asked the court to submit to the jury, as distinct issues to be tried, the propositions whether the two railroad companies which had held the bonds and the plaintiff were *bona fide* holders, and that the court refused.

Where the testimony is all one way and is conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise. It would tend to create a doubt where none existed, or ought to exist, and might mislead the jury.

Admitting that there could be doubt as to the companies, a concession by no means necessary to be made, there could be none, as the case appears in the record, with respect to the plaintiff. The inquiry was, therefore, immaterial as to them, and wrong as to him. The court properly declined to accede to the request.

The tenth and eleventh assignments charge error in the refusal of the court to direct the jury to find for the defendant. The former relates to a general request and refusal; the latter, to a request upon twelve specified grounds, with the same result.

The last assignment complains that the court directed the jury to find for the plaintiff.

It is well settled in the jurisprudence of this court, that if the facts are clearly established and are undisputed, it is competent for the court to give such a charge.

In one of the cases brought before us, where it had been done, the practice was commended, and it was remarked that "it gives the certainty of applied science to the results of judicial investigation." *Merchants' Bank* v. *The State Bank*, 10 Wall.

604. In whose favor the charge should have been given will appear by the result of our examination of the case.

We have already adverted to the good faith of the defendant in error as a purchaser. When he bought, he gave his negotiable notes, payable at different times, for the purchase-money.

The consideration was sufficient. 1 Daniel, Negotiable Securities, 584. Whether the notes were absolute, presumptive, or conditional payment, or only special collaterals to the amount to be paid, are points upon which there is great conflict in the authorities. 1 Parsons, Notes and Bills, 151, c. 7. We need not consider the subject in this case.

The plaintiff was not bound to allow his paper to go to protest, and take the hazards of the litigation which would have followed. The refusal to pay the note first due, upon the ground of the want of consideration, would doubtless have led to the transfer of the other notes, all under-due, and as to them, in that case, there could have been no defence. But irrespective of this, there could have been none upon the merits.

In *Otis et al.* v. *Cullom, Receiver* (92 U. S. 447), a city bond issued in Kansas was sold to the plaintiffs in New York. This court, on the ground that the legislature had no power to pass the act under which the bond was issued, adjudged it void. The plaintiffs subsequently sued to recover back what they had paid for it. This court held that in such cases there is only an implied warranty of title and genuineness, and that if there were no guaranty, and no fraud or misrepresentation on the part of the vendor in selling, the plaintiffs could not recover. It was said that such instruments pass from hand to hand like bank-notes, and that, if invalid, the law would not inflict the hardship of compelling every one who had passed them to pay back what he had received from his transferee. This case followed *Lambert* v. *Heath* (15 Mee. & W. 486), in which the same point was ruled in the same way.

The important question here is, whether the bonds were wholly void, — like a promissory note given for a gaming consideration, and made a nullity by statute, — or whether they were of such a character that a *bona fide* holder could enforce them like any other commercial security, free from infirmity.

It is not denied that the statutory authority to issue them

under the circumstances designated was ample and valid. In this respect our attention has been called to no defect; no question has been raised upon the subject.

Parties claiming to be a majority of the tax-payers, and to own the greater part of the taxable property of the town, petitioned the county judge for an order that the bonds of the town, to the amount of $80,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of the Clayton and Theresa Railroad Company. After hearing the petitioners and their opponents at the appointed time, the judge, on the 1st of July, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. An application was thereupon made by the dissatisfied parties to the Supreme Court for a writ of *certiorari*. The writ was allowed on the 30th of September, 1871. It was served upon the county judge, and he made the proper return. On the 27th of June, 1872, the Supreme Court, at a general term, affirmed the judgment. In the month of July following, the case was taken to the Court of Appeals, and in February, 1873, that court reversed the previous judgments and ordered the petition to be dismissed.

On the 3d of April, 1872, the commissioners appointed by the county judge subscribed for eight hundred shares of the stock of the railroad company, amounting to $80,000, and on the next day issued and delivered in payment one hundred and sixty of the bonds of the town of $500 each, and thereupon received from the company scrip for the stock, which the town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. The coupons in suit in this case were attached to one hundred and forty of these bonds. On the 26th of February, 1872, and on the 31st of May, 1873, the Clayton and Theresa Railroad Company entered into a contract with the Utica and Black River Railroad Company, and at the date of the second contract delivered all the bonds to Isaac Maynard, as collateral security for the fulfilment of both contracts, and with authority to him to sell the bonds and pay over the proceeds to the latter company. On the 4th of February, 1874, Maynard sold to the plaintiff the bonds here in question, under the circumstances before stated.

The Court of Appeals reversed the judgment of the county judge, solely upon the ground that when the case was before him he had refused to allow tax-payers who had signed the petition to withdraw their signatures, although applications for that purpose were made, and if it had been permitted, the numbers and taxable property represented would have been below the standard required by the statute to authorize the judgment that was rendered. It does not appear that any other objection was made by the contestants. *People ex rel.* v. *Sawyer*, 52 N. Y. 296. The previous reported adjudications are said to have been all contrary to this decision; none of them, however, were by the court of last resort. *Matter of Tax-payers of Town of Greene*, 38 How. Pr. (N. Y.) 515; Mem. of Decisions of Sup. Court, fols. 281, 282. See also *People* v. *Mitchell*, 35 N. Y. 555.

The bonds showed no defect upon their face. They purported to be issued by virtue of certain specified acts of the legislature, and set forth that the "commissioners, under the acts above referred to, for the town of Orleans, . . . upon the faith and credit and on behalf of said town, and confirmed by a majority of the tax-payers, representing a majority of the taxable property of the same, according to said acts, for value received, do hereby promise," &c.

When the county judge appointed the commissioners to issue the bonds, it was made their duty to proceed "with all reasonable despatch." They were not parties to the proceedings upon the *certiorari*, and hence were not directly affected by them. The same remarks apply to the corporation that received the bonds in payment for its stock. It is expressly provided by statute that in case of disagreement of the commissioners touching the issuing of the bonds the Supreme Court may decide and direct what shall be done, and that "said court . . . shall have power at any time, by injunction, to prevent the issue of said bonds, or any part thereof, on notice and for good cause shown; and any judge of said court may grant a temporary injunction until such motion can be heard." Laws of 1871, vol. ii. p. 2119, c. 935, sect. 5. In this case, a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad

company, if it received them, from parting with them, until the case made by the *certiorari* was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. *State of Illinois* v. *Delafield*, 8 Paige (N. Y.), 527; S. C. on appeal, 2 Hill (N. Y.), 160. The omission was gross laches. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any shall ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants. *County of Ray* v. *Van Syckle*, 96 U. S. 675.

Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern* v. *Nichols*, 1 Salk. 289; *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray* v. *Lardner*, 2 Wall. 110. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer County* v. *Hacket*, 1 id. 83; *San Antonio* v. *Mehaffy*, 96 U. S. 312; *County of Moultrie* v. *Savings Bank*, 92 id. 631; *Moran* v. *Commissioners of Miami County*, 2 Black, 722; *Knox* v. *Aspinwall*, 21 How. 539; *The Royal British Bank* v. *Turquand*, 6 El. & Bl. 325.

A corporation is liable for the acts of its servants while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances. *Philadelphia, Wilmington, & Baltimore Railroad Co.* v. *Quigley*, 21 How. 209; *Greene* v. *London Omnibus Co.*, 8 C. B. N. S. 290; *The Life and Fire Insurance Co.* v. *Mechanics' Fire Insurance Co. of New York*, 7 Wend. (N. Y.) 31.

The doctrine of *lis pendens* has no application to commercial securities. *Murray* v. *Lylburn*, 2 Johns. (N. Y.) Ch. 441;

Kieffer v. *Ehler*, 18 Pa. St. 388; *Stone* v. *Elliott*, 11 Ohio St. 252; *Mims* v. *West*, 38 Ga. 18; *Leitch* v. *Wells*, 48 N. Y. 585; *County of Warren* v. *Marcy*, 97 U. S. 96. See, in the case last named, Mr. Justice Bradley's full examination of the subject.

The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court. *Lynde* v. *The County*, 16 Wall. 6; *Township of Rock Creek* v. *Strong*, 96 U. S. 271. The plaintiff had no notice, actual or constructive, of the proceedings in the case subsequent to the first judgment, and is in nowise affected by them.

The County of Warren v. *Marcy* (*supra*) is in effect decisive of the case in hand. There the board of supervisors claimed to be authorized by a popular vote to subscribe for the stock of a railroad company, and to pay in county bonds to be issued by themselves. A tax-payer filed a bill in the county Circuit Court, and procured a preliminary injunction prohibiting the issue of the bonds. Before the final hearing this injunction was dissolved; at the final hearing the bill was dismissed. There had been no injunction in force after the preliminary injunction was disposed of.

The complainant appealed to the Supreme Court of the State. There, in due time, the decree of the lower court was reversed, and the case was remanded with directions to enter a decree in conformity to the prayer of the bill. But between the time of the dissolution of the preliminary injunction and the final hearing in the court below the supervisors subscribed for the stock and issued the bonds.

The same question arose as to the bonds there as here.

This court held that in the hands of a *bona fide* holder they were free from objection and could be enforced.

Our examination of this case with respect to the bonds here in question constrains us to come to the same conclusion.

There is no difference between the two cases in any material point.

We think the instruction given by the court below to the jury was correct.

Judgment affirmed.

MR. JUSTICE BRADLEY did not sit in this case.

LYONS v. MUNSON.

1. The ruling in *Orleans* v. *Platt* (*supra*, p. 676) as to the jurisdiction of the county judge in New York to decide upon the application made to him by the tax-payers of a town for an order that its bonds be issued to enable it to subscribe and pay for shares of the capital stock of a railroad company in that State, reaffirmed and applied to this case.
2. His judgment in favor of the subscription cannot be collaterally attacked in a suit on the bonds, brought by a *bona fide* holder for value of them against the town, and where it is recited in them, the town is estopped from denying their validity.

ERROR to the Circuit Court of the United States for the Northern District of New York.

This was an action brought by Edgar Munson upon three hundred and eighty-seven coupons or interest warrants originally attached to one hundred and twenty-nine bonds issued by the town of Lyons, Wayne County, New York, for $1,000 each, in payment of its subscription to the Sodus Bay, Corning, and New York Railroad Company, a corporation of that State, being the coupons for interest due respectively Oct. 1, 1872, and April 1 and Oct. 1, 1873, each for the sum of $35, payable to bearer at the Central National Bank of the city of New York.

Each bond bears date May 17, 1872, and recites that it was "issued under the authority contained in chapter nine hundred and seven of the laws of 1869 of that State, and the amendments thereto, and under and pursuant to a judgment and determination of the county judge of Wayne County, dated May 17, 1872, duly rendered and entered of record under and pursuant to a petition of the tax-payers of said town, praying that said town issue its bonds to the amount of $150,000, and invest the same in the capital stock of that company; and at the foot of each of them is the following certificate, viz.: —

"WAYNE COUNTY, ss.: — Registered in the county clerk's office.

"In witness whereof, the clerk of Wayne County has hereto set his hand and affixed his seal of office.

[L. S.] "ALFRED F. REDFIELD, *Clerk.*"

The defence relied on was that the plaintiff was not a *bona fide* holder of the coupons for value, and that the petition pre-

sented to the county judge was rendered illegal and void by containing a condition, in these words: "Provided that the terminus of said road is made at Nicholas Point, on Sodus Bay, in the town of Huron;" and a qualifying clause, in these words: "It is understood that the stock so to be taken is to embrace and include the stock now already subscribed and taken by persons residing in the said town of Lyons, amounting to the sum of $16,400;" and that by reason of the insufficiency and illegality of the petition, the county judge had no authority or jurisdiction to render the judgment mentioned in the bonds, and that the same are void.

The jury, under the direction of the court, returned a verdict for the amount of the coupons, with interest. The questions of law were reserved for consideration upon the motion of the plaintiff for judgment on the verdict. After argument, judgment was rendered in his favor.

The defendant thereupon sued out this writ.

Mr. H. L. Comstock for the plaintiff in error.
Mr. W. F. Cogswell, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

All the questions presented for our consideration by this record relate to the validity of bonds issued by the town of Lyons in payment for railroad stock subscribed by its proper authorities.

Propositions covering the entire ground of the controversy between the parties have been so frequently decided by this court that any extended examination of the case is unnecessary. *Orleans* v. *Platt* (*supra*, p. 676), our last adjudication of this class, is conclusive in favor of affirming the judgment of the Circuit Court.

The county judge unquestionably had jurisdiction to decide upon the application made by the tax-payers. His judgment until reversed was final. If there were errors, the proceedings should have been brought before a higher court for review by a writ of *certiorari*, and if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation. The judgment rendered can no more be collaterally attacked in this case than could any other judg-

ment of a court of competent jurisdiction rendered with the parties, as in this case, properly before it. The recital in the bonds sets forth the judgment of the county judge, that it was duly rendered, that the bonds were issued pursuant to the statutes referred to, for the object specified in the petition of the tax-payers, and by persons properly appointed and charged by law with the duty of subscribing for the stock and issuing the bonds to pay for it.

The sufficiency of the statutory authority under which the proceedings were had is not denied.

Under such circumstances the recital is an estoppel. A *bona fide* holder of the bonds was not bound to look further, and the obligor cannot go behind it. *Orleans* v. *Platt*, *supra*; *Lynde* v. *The County*, 16 Wall. 6; *Mercer County* v. *Hacket*, 1 Wall. 83; *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; *Township of Rock Creek* v. *Strong*, 96 U. S. 271.

The learned judge below in his charge to the jury well remarked: "To imply the intent that such obligations after they are negotiated shall be vulnerable to the objections here urged, would be to impute bad faith to the authors of such legislation towards those who are to be induced to invest in such bonds."

Judgment affirmed.

BLOCK v. COMMISSIONERS.

COMMISSIONERS v. BLOCK.

1. A., the lawful holder of coupons detached from bonds issued by a county in Kansas, applied to a court of competent jurisdiction for a *mandamus* to compel the county commissioners to pay such of them as were then due, and levy a tax sufficient to pay those shortly thereafter falling due. The commissioners denied the validity of the bonds and the obligation of the county to pay them. Judgment was rendered for the defendants. Subsequently, A. delivered the same coupons to B., to be collected for the benefit of A. B. brought suit. *Held*, that the judgment was a bar to the suit.
2. The court again decides that a *bona fide* purchaser of municipal bonds for a valuable consideration, who had no actual notice of any defence which could be set up against them, is not bound to look further than to see that there was legislative authority for their issue, and that the officers who were thereunto authorized have decided that the precedent conditions upon which

it was allowed to be exercised have been fulfilled. If such authority was conferred and such a decision made, the bonds are valid obligations which he may enforce.

3. Where, pursuant to a statute entitled "An Act authorizing counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, as amended Feb. 26, 1866, an election was held in a county in Kansas upon the question of a county subscription to the capital stock of "any railroad company" then, or thereafter to be, organized which should construct a railroad from a point in Missouri to a point in the county, and the result having, May 8, 1867, been declared by the proper authorities to be in favor of the subscription, and so entered on their minutes, the bonds were, in 1870, issued in payment of the subscription to a Missouri company, which caused the road to be built, — *Held*, that the subscription was binding, and that the county, in an action on the bonds by such a purchaser, is estopped from asserting that in fact a majority of the qualified electors had not voted in favor of the issue of the bonds.

ERROR to the Circuit Court of the United States for the District of Kansas.

This was an action brought, March 17, 1875, by Block, against the board of commissioners of the county of Bourbon, Kansas, upon overdue coupons, amounting in the aggregate to $16,800, detached from bonds issued by that county.

A copy of one of the bonds and coupons is as follows: —

"No. —.] STATE OF KANSAS. [$1,000.

"*Stock Bond of Bourbon County.*

"Thirty years after date, the County of Bourbon promise to pay to the Tebo and Neosho Railroad Company, a corporation organized by authority of the laws of the State of Missouri, and by virtue of an act of incorporation passed by the legislature of the State aforesaid, and approved the sixteenth day of January, 1860, or bearer, the sum of one thousand dollars, for value received, with interest at the rate of seven per cent per annum, payable semi-annually, at the New York National Exchange Bank, in the city of New York, from and after the first day of January, 1871.

"City of Fort Scott, Kansas, July 1, 1870.

"By order of the board of county commissioners of the county of Bourbon, Kansas, dated March 8, 1867.

[SEAL.] "D. GARDNER,

"*Chairman, Board of County Commissioners, Bourbon County*

"Attest: C. FITCH, *Clerk.*"

"FORT SCOTT, KANSAS, July 1, 1870.

"Treasurer of Bourbon County will pay bearer thirty-five dollars, at the New York National Exchange Bank, in the city of New

York, being semi-annual interest due on the —— day of ——, 18—, on the bond of the county of Bourbon, No. ——, to the Tebo and Neosho Railroad Company, issued in pursuance of an order of the board of county commissioners of said county, dated March 8, 1867.

"D. GARDNER,
"*Chairman, Bourbon Board of County Commissioners.*
"C. FITCH, *County Clerk.*"

Under its charter, granted Jan. 16, 1860, the company had power to construct a road between certain points, and to extend and operate it or its branches beyond the limits of Missouri. It transferred, in October, 1870, by authority of a statute of that State, its franchises, rights, and privileges, "including subscriptions," south of a designated point, to the Missouri, Kansas, and Texas Railway Company, a Kansas corporation. The latter company assumed all indebtedness incurred for the construction or otherwise of the line between Sedalia, Mo., and Fort Scott, the county seat of said county, and constructed in due time the road through that county, *via* Fort Scott, to Texas. The road is now in full operation.

The said board, March 8, 1867, adopted an order, which was duly entered on its minutes, as follows:—

"Be it ordered by the county commissioners of Bourbon County, Kansas, that there be subscribed, in the name and for the benefit of the county of Bourbon, in the State of Kansas, $150,000 to the capital stock of any railroad company now organized or that shall hereafter be organized that shall construct a railroad commencing at a point on the Tebo and Neosho Railroad, running westward *via* Fort Scott, and that the bonds of said county be issued to said company for the same, said bonds to be payable within thirty years from the date thereof, and bearing interest at the rate of seven (7) per centum per annum: *Provided*, that said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon, and shall have received a majority of the votes cast in favor of the same, in pursuance of the provisions of an 'Act to authorize counties and cities to issue bonds to railroad companies,' approved Feb. 10, 1865; and that said question shall be submitted to said electors at a special election on the seventh day of May, A.D. 1867.

"At said election the votes shall be cast 'For railroad bonds' and 'Against railroad bonds;' and if it shall appear, upon a canvass of said votes by the proper officers, according to law, that a majority of the votes cast are in favor of the said subscription, then the above order shall be carried into practical operation by the issuing of said bonds to said company whenever the county commissioners of Bourbon County are satisfied that the road-bed of the Tebo and Neosho Railroad is completed to such a point that the amount of said bonds shall be sufficient and adequate to construct the road-bed and connect the said point with the city of Fort Scott."

Said order was duly published, and the election held pursuant thereto. On canvassing the returns, the board declared, May 10, 1867, that there was a majority of twenty-six votes "for railroad bonds," and that there was no evidence that an election had been held in the township of Franklin.

The poll-book from that township did not arrive at the clerk's office until after the commissioners had adjourned.

The board, July 23, 1869, made a further order, providing for a special election on the twenty-fourth day of the following August. The election was duly held accordingly, and on canvassing the votes, the board declared that a majority of them had been cast in favor of the proposed subscription.

The board thereupon appointed an agent to subscribe, in the name and for the benefit of the county, $150,000 to the capital stock of said Tebo and Neosho Railroad Company, upon the express condition, "which was made a part of said subscription," that the county bonds should not be delivered to the company, nor the county become liable to pay any portion of its subscription, until the road-bed of the company should be completed to such a point that the amount of bonds should be sufficient to complete the road from Sedalia, Mo., to Fort Scott. There was a further condition that the subscription should be void unless the road-bed was completed to Fort Scott, Jan. 1, 1872.

The board, July 2, 1870, ordered that the bonds bearing date July 1, 1870, of the tenor and effect of the foregoing copy, be issued, and deposited with a certain person as trustee of the county, for delivery to the company when the condi-

tions upon which they had been voted should be complied with.

The board, Jan. 2, 1871, upon a report made to it, approved the delivery, on the fifth day of November, 1870, of the bonds to the company, the coupons covering interest from July 1 to Sept. 1, 1870, having been detached therefrom.

The board, June 27, 1872, ordered that the poll-book of Franklin Township of the election held May 7, 1867, which had remained sealed since it had been delivered by the messenger of the township, should be opened. The board declared, after inspecting said book, that if the vote then cast by that township had been computed in canvassing the county vote, the proposition to vote the bonds would have been rejected.

The board thereupon ordered the treasurer of the county to withhold the payment falling due on said bonds July 1, 1872, and to notify the New York National Exchange Bank of the City of New York, as the fiscal agent of the county, that no more interest would be paid on them, and that the principal would not be paid at maturity.

The county levied and collected taxes for 1870, 1871, and 1872, to pay interest on the bonds in suit, and paid the first three instalments of interest thereon.

Certain coupons, on which this suit was brought, numbered four, originally attached to said bonds, from one to one hundred, had been in controversy in a *mandamus* proceeding in the Supreme Court of Kansas, instituted by one Lewis, then and still the real and beneficial owner of them. They were in possession of Block for collection.

The remaining facts are stated in the opinion of this court. The Circuit Court gave judgment in favor of the county on the coupons in suit which were attached to the bonds numbered from one to one hundred, inclusive, and against it for the remaining coupons, being on bonds owned by Block, numbered one hundred and thirty-one to one hundred and fifty.

Each party sued out a writ of error.

Mr. John D. Stevenson for Block.

Mr. J. E. McKeighan, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

These are writs of error complaining of one judgment. The plaintiff, Block, brought suit against the board of commissioners of the county of Bourbon, Kansas, to recover the amount of $16,800 alleged to be due him upon past-due interest coupons detached from bonds made and issued by that county. From the findings of fact made by the court below it appears that the plaintiff is the *bona fide* owner of twenty of the bonds from which part of the coupons in suit were taken, and that he purchased them in open market without actual notice of any defence the county now sets up against them. The remaining coupons are the property of one William J. Lewis, delivered by him to the plaintiff to be collected, not for the benefit of Block, but for that of Lewis, the true owner. Whether, in view of such a finding, a recovery for them can be had in this suit, if there were no other objection to it, we do not now determine. There is another and graver question to be considered. The Lewis coupons had been in litigation before this suit was commenced. In January, 1873, he applied to the Supreme Court of the State for a *mandamus*, suggesting that he was the owner of bonds of the county, one hundred in number, and numbered from one to one hundred, and of the coupons attached to the same; that he was the holder, bearer, and owner of the one hundred coupons due and payable July 1, 1872, part of the coupons now in suit; that a tax had been levied and collected amply sufficient to pay those coupons, but that the county had refused to pay them. The suggestion further represented that the proper officers of the county had neglected and refused to take the necessary steps to make provision for the payment of the coupons falling due in 1873, in January and July, and by an alternative writ the board of commissioners of the county were commanded to pay the coupons due in 1872, and to provide for levying a tax sufficient to pay the coupons as they should fall due in 1873.

To this alternative writ the commissioners answered, in substance, denying the validity and obligation of the bonds. Much of the answer was formal and quite immaterial, but there was also much of substance. It was denied that there had been any proper submission to the electors of the county of the ques-

tion whether the county should subscribe to the stock, or issue bonds to the railroad company to which the bonds were issued, to wit, the Tebo and Neosho Railroad Company. The answer further averred that, though there was a submission of the question to the electors whether the county would vote $150,000 to any railroad running east to connect with the aforesaid road, a majority of the votes cast at the election ordered was cast against the proposition. It further avers that though the commissioners canvassed the vote and decided from the returns before it that a majority had voted in favor of the proposition, the returns from one township were not brought in until after the canvass had been completed, and until after the board had adjourned, and that if the return from that township had been made in season and had been counted, a majority would have appeared against the proposition submitted. This belated return remained unopened until years afterwards, until after the bonds had been issued and after a new submission to the electors had resulted in the vote of a decided majority in favor of the bonds. This new submission, it was averred, was made in 1869, and it was not until after the vote had been taken that a subscription was made to the stock of the Tebo and Neosho Railroad Company, and the bonds of the county were issued in payment. At the time when the subscription was ordered to be made and the bonds were directed to be executed and delivered to the railroad company, it was also ordered that the stock of the county in the railroad company should be sold to the Land-Grant and Trust Company of New York, for the sum of five dollars.

Upon the issue thus tendered and made up the case was tried by the Supreme Court of the State, and a judgment was given for the defendant. What the effect of this judgment was has a most important bearing upon the inquiry whether there can be any recovery in the present suit for the coupons belonging to Lewis, the relator in the application for the *mandamus*.

To obtain a clear appreciation of that, it is necessary to observe closely what was in issue in the proceeding in the State court, and consequently what was adjudicated. It was not denied that Lewis was the owner of the one hundred bonds to which the coupons now in suit for his use were attached.

It was not denied that the coupons were due and unpaid, as averred in the suggestion and alternative writ. Nor was it denied that the officers of the county had power, and that it was their duty to levy a tax to pay them and to make payment, if they were a lawful debt of the county. In legal effect all this was admitted. The only issue tendered and the only issue tried was that tendered by the answer; namely, that the bonds and coupons were unauthorized by law, because a majority of the voters of the county, voting at the election in 1867, had not sanctioned a subscription to the stock of the railroad company, and approved the proposition submitted for the issue of the bonds. If they had not, the bonds were unauthorized, and the coupons, of course, constituted no debt of the county. Then the relator was not entitled to his *mandamus*. If, on the other hand, the bonds and coupons were lawfully issued, either in pursuance of the vote of 1867 or that of 1869, they did constitute a debt of the county, and a *mandamus* to enforce their payment necessarily followed. The court gave judgment for the defendant, as we have seen, and thus decided that the bonds and coupons held and owned by Lewis were invalid. Such was the necessary effect of the judgment. The issue tried was a material one, and the judgment could not have been rendered without deciding it. Now that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go farther, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded. As between Lewis, therefore, and Bourbon County the judgment of the State Supreme Court finally established that the coupons which he held, and which he subsequently placed in the hands of Block, the plaintiff in the present suit, were invalid, and constituted no part of the debt of the county. As that judgment was pleaded in the present case, it was a conclusive answer to the suit so far as it was founded upon those

coupons. The plaintiff's writ of error, consequently, cannot be sustained.

The coupons held and owned by Block are in a different position. As between him and the county there is no estoppel. He was not party to the suit in which the Lewis coupons were adjudged invalid, and he is unaffected by the judgment therein. Of the coupons which he holds he is a *bona fide* holder, having purchased them for a valuable consideration, without actual notice of any defence which could be set up against them. When he bought he was under no obligation to look farther than to see that there was legislative authority for the issue of the bonds, and that the condition upon which it was allowed to be exercised had been fulfilled. If there was such authority, and the precedent conditions had been performed, the bonds and coupons are valid obligations of the county, which he, as their owner, may enforce.

The bonds are dated July 1, 1870, and on their face they purport to have been issued by order of the board of county commissioners of the county of Bourbon, Kansas, dated March 8, 1867, and they are made payable to the Tebo and Neosho Railroad Company or bearer.

The authority under which it is claimed they were issued was an act of the legislature of the State of Feb. 10, 1865, amended by an act passed Feb. 26, 1866. By that it was enacted "that the board of county commissioners of any county to, into, from, or near which, whether in this State or any other State, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation in the name and for the benefit of such county, not exceeding in amount the sum of $300,000 in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment of said stock, . . . but no such bonds shall be issued until the question shall first be submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the board of county commissioners, . . . and in submitting such question said board of directors shall direct in what manner the ballots shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same."

In this act several things are to be noticed. The bonds were allowed to be issued in payment for subscriptions to stock of *any* railroad company, whether its road was then located, or might be thereafter, whether it *was in the State or out of it*, in the county or out of it, provided the question of subscription to the stock and issuing the bonds was first submitted to a vote of the qualified electors, and a majority was found in favor of issuing the bonds. Another thing is manifest. It was the legislative intention that the board of commissioners should be the body which should submit the question of subscription and issue of the bonds to popular decision, and they were also deputed to determine the result of the election, — we mean the board as it was constituted at the time when an election might be held.

Authorized by this statute, the board of county commissioners, on the 8th of March, 1867, submitted to the electors of the county the question whether there should be subscribed for the county $150,000 to the stock of any railroad company then organized, or that might thereafter be organized, that should construct a railroad commencing at a point on the Tebo and Neosho Railroad running westward, *via* Fort Scott (in Bourbon County), and should issue bonds to the company for the same. Pursuant to this submission an election was held, the returns of which were canvassed at the proper time by the board, and the result declared to be that a majority of the votes had been cast in favor of the subscription and the issue of the bonds. This was on the 10th of May, 1867. The declaration of the result was duly entered upon the minutes of the board. Subsequently an additional return was made from one township which was not before the board when the canvass was made. Had it been, the result would have been different. But this return was not opened until June 27, 1872, long after the bonds had been issued. Upon the records of the board nothing appeared to impeach the canvass made in 1867, though in the files of the office the belated poll-book remained unopened. It is hardly necessary to say that the board, *as it was in* 1872, had no authority to make a new canvass of the election held in 1867, after the bonds had been issued and purchasers had bought on the faith of the canvass first made.

The bonds, it is true, contain no recitals. If they did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the county, and a purchaser would have needed to look no farther than to the act of the legislature. This is according to all our decisions. But in the absence of any recital it may be conceded he was bound to inquire whether a majority vote had been returned for the issue of the bonds. But where was he to inquire? Plainly only of the board whose province it was to ascertain and declare the result of the election. Had he gone to their records, they would have shown that the popular vote was in favor of the bond issue. They showed nothing else until 1872. He was not bound to canvass the vote for himself, or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualification of the electors. And if, relying upon the canvass of the board and the declared result, he accepted the obligations of the county, it would be a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the first and annul rights that had been acquired under it. There is no such law. For all legal purposes the result of an election is what it is declared to be by the authorized board of canvassers empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it. The county of Bourbon is therefore estopped, in a suit by a bondholder whose bonds were issued in 1870, from asserting that the canvass of 1867 was incorrect, and that in fact no majority of the qualified electors had voted in favor of the issue of the bonds. All that took place afterwards, all the new evidence that was discovered, the new election ordered and held in 1869, and the action of the board after the bonds were issued, are immaterial. It follows that much of the argument of the learned counsel for the county who has argued against the validity of the bonds and coupons is unsound. It assumes, what cannot be admitted, that a majority of the votes cast at the election in 1867 was against the issue of the bonds, when it was conclusively established by the decision of the tribunal appointed by law to

determine the result of the election, that the contrary was the fact.

We pass now to the consideration of some of the objections made to the order of the county board of March 8, 1867, submitting to the qualified electors the question whether there should be a subscription made to the stock of any railroad organized, or that might thereafter be organized, that should build a railroad commencing at a point on the Tebo and Neosho Railroad and running westward to Fort Scott, and whether county bonds should be issued to said company therefor. It is said this did not authorize a subscription to the stock of the Tebo and Neosho Railroad Company, or the issue of bonds to it. The objection, in view of the facts that appear in the record, is of no weight. When the order was made, that company had been incorporated by the legislature of Missouri, and had projected its road along and near the northern boundary of that State through a county adjoining Bourbon. The order of the county board contemplated a connection of Fort Scott with that road, and the issue of bonds to any company that would make that connection. A part of the connecting road was necessarily in Missouri and a part in Kansas. The Missouri corporation could only build, by its own direct action, to the State line, and a Kansas corporation could only build the part in Kansas; but the Tebo and Neosho Company could and did cause the entire line to be constructed. It had power by its charter to extend, construct, maintain, and operate its railroad and branches beyond the limits of the State, so far as Missouri could give it that power. In 1869, that company, under legislative authority, sold all its privileges, rights, powers, and franchises to the Missouri, Kansas, and Texas Railway Company, organized under the laws of Kansas, stipulating that the vendee should assume all indebtedness incurred for the construction, or otherwise, of the line between Sedalia, Mo., and Fort Scott (in Bourbon County, Kansas). Accordingly the road begun by the Tebo and Neosho Company was constructed and extended to and beyond Fort Scott, and is now in operation. There can be no doubt that this was a compliance by the Tebo and Neosho Company with the conditions prescribed by the order of the county board. It built the road

through the agency of the Kansas corporation, and it therefore answered the description made in the order of submission. The county commissioners subscribed to its stock and issued the bonds to it, or bearer, and their action was warranted, as we have said, by the terms of the submission and its approval. It was not a case of authority given to issue bonds to one railroad company, and their issue to another.

We have said enough in refutation of the argument that because the Tebo and Neosho Railroad Company was a Missouri corporation, and could not, therefore, extend its road into Kansas, it was excluded from the roads contemplated in the order and election. If it was, then every railroad company was excluded, for even a Kansas company could not build a road into Missouri. Yet the order and election meant something. No company was named in the order. None could be. But a description was given that pointed unmistakably to the company that caused the work to be done. In *Commissioners of Johnson County* v. *Thayer* (94 U. S. 631), this court held that under the Kansas statute of 1865 it is not necessary to name any particular company in the submission to the popular vote. A description of a railroad company may well be made without mentioning its corporate name.

This is all that, in our judgment, these cases require. We have not deemed it necessary to invoke in aid of our conclusions the provisions of the curative act of 1868, for we think it is not open to question that a majority of the qualified electors of the county approved the subscription that was made and the issue of the bonds. That was finally determined by the board, whose duty it was to canvass the result of the election and declare the result. Their decision has never been reversed by any competent authority, and it cannot be impeached collaterally. Nor do we place any reliance upon the second order made in 1869, and the election held thereunder, resulting in a large majority in favor of the subscription and issue of the bonds. The bonds stand on the order and vote of 1867, as determined by the canvassing board at that time.

Nor can we yield assent to the claim that the acts of 1865 and 1866 were repealed by the General Statutes of 1868. Certainly there was no express repeal, and we can discover no

necessary implication of a repeal. And it may be added, that the Supreme Court of the State seems to regard those acts as still in force. *Lewis* v. *The Commissioners* (12 Kan. 186) gives no intimation to the contrary, though the court had before it the questions we are now considering. In *Morris* v. *Morris County* (7 id. 576), decided in 1871, the court said: "The acts of 1865–66 have never been expressly repealed; and if they have ever been impliedly repealed, all rights, power, and authority that had accrued under them prior to their repeal had at least been impliedly reserved." And again: "Whatever was done under the acts of 1865 and 1866, prior to the passage of the acts of 1868, continued in force the same as though the acts of 1868 had never been passed."

We have not overlooked the opinion delivered by the Supreme Court of the State in *Lewis* v. *The Commissioners*, *supra*. The judgment in the case was not given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are, therefore, at liberty to follow our own convictions of the law. To those expressed by the State court we cannot assent. They are not in harmony with many rulings of this court made and repeated through a long series of years, and they are not such as in our opinion would administer substantial justice if applied to this case.

Judgment affirmed.

MR. JUSTICE CLIFFORD dissented from the opinion of the court in the first, and concurred in it in the second case.

SINKING-FUND CASES.

UNION PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

CENTRAL PACIFIC RAILROAD COMPANY *v.* GALLATIN.

1. So far as it establishes in the treasury of the United States a sinking-fund, the act of Congress approved May 7, 1878 (20 Stat. 56), entitled "An Act to alter and amend the act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and also to alter and amend the act of Congress approved July 2, 1864, in amendment of said first-named act," is not unconstitutional.
2. The debt of the respective companies therein named to the United States is not paid by depositing and investing the fund in the manner prescribed by that act.
3. Retaining in the fund the one-half of the earnings for services rendered to the government by the respective companies, which, by the act of July 2, 1864 (13 Stat. 356), was to be paid, does not release the government from such payment. Although kept in the treasury, the fund is owned by them, and they will be entitled to the securities whereof it consists which remain undisposed of when the debts chargeable upon it shall be paid. Under the circumstances, such retaining is, in law, a payment to them.
4. The establishment of the fund is a reasonable regulation of the administration of the affairs of the companies, promotive alike of the interests of the public and of the corporators, and is warranted under the authority which Congress has, by way of amendment, to change or modify the rights, privileges, and immunities granted by it.
5. The right of amendment, alteration, or repeal reserved by Congress in said acts of 1862 and 1864 considered.
6. The legislation of Congress in relation to the Central Pacific Railroad Company and the Western Pacific Railroad Company — the latter now by consolidation a part of the former — considered, and *held*, 1. That, to the extent of the powers, rights, privileges, and immunities thereby granted, Congress retains the right of amendment, and by exercising it may, in a manner not inconsistent with the original charter granted by California, as modified by the act of that State passed in 1864, accepting what had been done by Congress, regulate the administration of the affairs of the company in reference to the debts created by it under authority of such legislation. 2. That the establishment of the sinking-fund by the act of May 7, 1878 (*supra*), does not conflict with any thing in said charter.

APPEAL from the Court of Claims.

Appeal from the Circuit Court of the United States for the District of California.

The Union Pacific Railroad Company filed its petition in the

Court of Claims against the United States. The court found the following facts: —

1. That during the month of July, 1878, the claimant, at the request of the defendant, transported troops of the United States over the claimant's road, as averred in the petition.

2. That the amount and value of said service so rendered by the claimant for the defendant, as stated in proposition first, was and is the sum of $10,451.73, the same being fair and reasonable compensation for said service, and not exceeding the amounts paid by private parties for the same kind of service.

3. That said amount was duly allowed and audited by the accounting officers of the treasury for the said service, on the eighth day of October, 1878.

4. That on the twenty-eighth day of October, 1878, the claimant demanded of the defendant the one-half of the said sum, to wit, $5,225.68½, and protested against the payment of said one-half into any sinking-fund, or its application to the payment of bonds issued by the United States to said company, or to the interest thereon, and against the retention of said one-half by the United States on any account whatever.

5. That on the fourth day of November, 1878, the proper officers of the Treasury Department of the United States is sued a warrant, No. 5950, for the said amount of $10,451.73, on account of the transportation aforesaid.

6. That on the fifth day of November, 1878, the Secretary of the Treasury refused to pay the said one-half to the claimant, giving as his reason therefor that the same was required by an act of Congress, approved May 7, 1878, hereinafter referred to, to be turned into a sinking-fund, as provided in said act.

7. That on Nov. 6, 1878, a draft to the order of the Secretary of the Treasury, assignee of the Union Pacific Railroad Company, for $10,451.13, was issued. That the Secretary of the Treasury made the following indorsement on the draft: —

"Pay to the Treasurer of the United States, to be by him deposited in the United States Treasury, in general account, on account of moneys received from the Union Pacific Railroad Company, being the compensation found due it for transportation per-

formed for the War Department in July, 1878, and withheld in accordance with the provisions of sect. 2, act May 7, 1878, as follows:—

"One-half, $5,225.86, on account of reimbursement of interest paid on bonds issued to the Union Pacific Railroad Company.

"Credit to be given under date of August —, and one-half, $5,225.87, on account sinking-fund, Union Pacific Railroad Company, to be carried to credit under sect. 4 of the above act.

"JOHN SHERMAN,
"*Secretary of the Treasury, Assoc. Union Pacific Railroad.*"

And the Assistant Treasurer of the United States indorsed the same.

8. That the Assistant Treasurer of the United States issued a certificate of deposit, showing that $10,451.73 on account of moneys received from the Union Pacific Railroad Company, being compensation found due it for transportation performed in July, 1878, and withheld, &c., have been deposited in the treasury.

9. That revenue covering warrants were issued, showing the moneys before mentioned have been covered into the treasury, one-half, viz. $5,225.86, on account of reimbursement of interest, and one-half, viz. $5,225.87, on account of sinking-fund.

10. That the Secretary of the Treasury directed the Treasurer of the United States to purchase at the end of each month five per cent bonds of the United States, to the amount of the moneys withheld from the Union and Central Pacific Railroad Companies since July 1, 1878, and apply the same to the credit of the company from which the money may have been withheld, the bonds to be registered in the name of the Treasurer of the United States. In a schedule annexed, the sum of $5,225.87 appears as having been withheld on this account.

11. That the Treasurer of the United States, in accordance with the directions above recited, purchased bonds of the funded loan of 1881, for account of the sinking-fund, Union Pacific Railroad Company, to a large amount.

12. That an appropriation warrant was issued on account of sinking-fund, Union Pacific Railroad Company, for the amount expended by the Treasurer of the United States in the pur-

chase of five per cent bonds as before recited, and there was included in the amount appropriated the sum of $5,225.87, which had been deposited and covered into the treasury, as shown in the other findings.

13. That the claimant never assigned or in any way parted with the claim sued for; but the issuing of said warrant mentioned in finding No. 5, in favor of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, and the issuing of the draft on said warrant, as found in finding No. 7, payable to the order of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, was each the act of the defendant, done without the consent of the claimant; and the said warrant and draft were issued in that form for the purpose of enabling the proper officers of the Treasury Department to place the said money in the treasury, as found in the preceding findings.

14. That the said amount placed to the credit of the sinking-fund, to wit, the sum of $5,225.87, as hereinbefore found, is the one-half of the money earned by the claimant, as found in the above findings, Nos. 1 and 2, and for which half this action is prosecuted.

The court adjudged that the petition be dismissed, and the company thereupon appealed.

Gallatin, a stockholder of the Central Pacific Railroad Company, filed his bill against it and the persons constituting its board of directors, to compel them to comply with the requirements of the said act of May 7, 1878. He alleges that the board has threatened to disregard them, and that, Aug. 27, 1878, it declared a dividend of one per cent upon the capital stock of the company payable out of the earnings accumulated since June 30, 1878, although the company was then in default in respect of the payment of five per cent of the net earnings as required by the said act; that one of the consequences of its conduct, if persisted in, will be a forfeiture of the company's property and franchises, to his irreparable injury. He prays for an injunction to restrain the directors from paying a dividend while the company is in default in respect to any of the terms, requirements, or provisions of said act, and from doing any other or further thing whatever in the premises in

contravention or disregard thereof, or that will jeopardize or imperil, or cause or tend to cause, thereunder a forfeiture of any of the rights, privileges, grants, or franchises derived or obtained by said company from the United States.

The defendants filed a demurrer, which was overruled, and on their declining to answer, the court passed a decree in conformity with the prayer of the bill. They thereupon appealed.

The following is the legislation bearing upon the questions involved.

The act of Congress approved July 1, 1862 (12 Stat. 489), by its first section enacts: —

"That Walter S. Burgess" and other persons therein named, "together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of 'The Union Pacific Railroad Company;' and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act, as herein set forth. . . .

"SECT. 2. That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the

public lands, including all necessary grounds for stations, buildings, workshops and depots, machine-shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

"SEC. 3 [as amended by sect. 4 of act of July 2, 1864. 13 Stat 356]. That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

"SEC. 4 [as amended by sect. 6, act of 1864]. That whenever said company shall have completed twenty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report in relation thereto; and if it shall appear to him that twenty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount

aforesaid; and patents shall in like manner issue as each twenty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise shall be filled by the President of the United States: *Provided, however*, that no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such twenty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

"SECT. 5. That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty [afterwards, by act of 1864, reduced to twenty] consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of $1,000 each, payable in thirty years after date, bearing six per centum per annum interest (said interest payable semi-annually), which interest may be paid in United States treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for each section of forty [twenty] miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, this section shall not apply to that part of any road now constructed.

"SECT. 6. That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all [by act of 1864 reduced to half] compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

"SECT. 9. That . . . the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

"SECT. 10. That . . . the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

"SECT. 11. That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued in the construction thereof shall be treble the number per mile hereinbefore provided; and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, that no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph."

"SECT. 17. That in case said company or companies shall fail to comply with the terms and conditions of this act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, that if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned, and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States. . . .

"SECT. 18. That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for

services rendered for the United States, after deducting all expenditures, — including repairs, and the furnishing, running, and managing of said road, — shall exceed ten per centum upon its cost (exclusive of the five per centum to be paid to the United States), Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time — having due regard for the rights of said companies named herein — add to, alter, amend, or repeal this act."

Sections of the Act of July 2, 1864. 13 Stat. 356.

"SECT. 5. That . . . , and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads."

"SECT. 10. That sect. 5 of said act [act of July 1, 1862] be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States." . . .

"SECT. 22. And be it further enacted, that Congress may at any time alter, amend, or repeal this act."

Act of May 7, 1878. 20 Stat. 56.

AN ACT to alter and amend the act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act.

"Whereas, on the first day of July, anno Domini eighteen hundred and sixty-two, Congress passed an act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes;' and

"Whereas afterwards, on the second day of July, anno Domini eighteen hundred and sixty-four, Congress passed an act in amendment of said first-mentioned act; and

"Whereas the Union Pacific Railroad Company, named in said acts, and under the authority thereof, undertook to construct a railway, after the passage thereof, over some part of the line mentioned in said acts; and

"Whereas, under the authority of the said two acts, the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, undertook to construct a railway, after the passage of said acts, over some part of the line mentioned in said acts; and

"Whereas the United States, upon demand of said Central Pacific Railroad Company, have heretofore issued, by way of loan and as provided in said acts, to and for the benefit of said company, in aid of the purposes named in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half-yearly, to the amount of $25,885,120, which said bonds have been sold in the market or otherwise disposed of by said company; and

"Whereas the said Central Pacific Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated and secured thereby; and

"Whereas, after the passage of said acts, the Western Pacific

Railroad Company, a corporation then existing under the laws of California, did, under the authority of Congress, become the assignee of the rights, duties, and obligations of the said Central Pacific Railroad Company, as provided in the act of Congress passed on the third of March, anno Domini eighteen hundred and sixty-five, and did, under the authority of the said act and of the acts aforesaid, construct a railroad from the city of San José to the city of Sacramento, in California, and did demand and receive from the United States the sum of $1,970,560 of the bonds of the United States, of the description before mentioned, as issued to the Central Pacific Company, and in the same manner and under the provisions of said acts; and upon and in respect of the bonds so issued to both said companies the United States have paid interest to the sum of more than $13,500,000, which has not been reimbursed; and

"Whereas said Western Pacific Railroad Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States to it, and secured the same by mortgage, which are, if lawfully issued and disposed of, a prior and paramount lien to that of the United States, as stated, and secured thereby; and

"Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby the said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company; and

"Whereas the United States, upon the demand of the said Union Pacific Railroad Company, have heretofore issued, by way of loan to it, and as provided in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half-yearly, the principal sums of which amount to $27,236,512; on which the United States have paid over $10,000,000 interest over and above all reimbursements; which said bonds have been sold in the market or otherwise disposed of by said corporation; and

"Whereas said corporation has issued and disposed of an amount of its own bonds equal to the amount so issued to it by the United States as aforesaid, and secured the same by mortgage, and which

are, if lawfully issued and disposed of, a prior and paramount lien in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

"Whereas the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than $96,000,000, and those of the said Union Pacific Railroad Company to more than $88,000,000; and

"Whereas the United States, in view of the indebtedness and operations of said several railroad companies respectively, and of the disposition of their respective incomes, are not and cannot, without further legislation, be secure in their interests in and concerning said respective railroads and corporations, either as mentioned in said acts or otherwise; and

"Whereas a due regard to the rights of said several companies respectively, as mentioned in said act of eighteen hundred and sixty-two, as well as just security to the United States in the premises, and in respect of all the matters set forth in said act, require that the said act of eighteen hundred and sixty-two be altered and amended as hereinafter enacted; and

"Whereas, by reason of the premises also, as well as for other causes of public good and justice, the powers provided and reserved in said act of eighteen hundred and sixty-four for the amendment and alteration thereof ought also to be exercised as hereinafter enacted: Therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of

the United States or of either of said railroad companies existing prior thereto.

"SECT. 2. That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively, for services rendered for the government, shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking-fund hereinafter provided, for the uses therein mentioned.

"SECT. 3. That there shall be established in the Treasury of the United States a sinking-fund, which shall be invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless, for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

"SECT. 4. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the government by said Central Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the treasury, to the credit of said sinking-fund, the sum of $1,200,000, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States, under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding. That there shall be carried to the

credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the treasury, to the credit of said sinking-fund, the sum of $850,000, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding.

"SECT. 5. That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury, by either of said companies, that seventy-five per centum of its net earnings, as hereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of such company, in respect of which obligations there may exist a lien paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is hereby authorized, and it is made his duty, to remit for such current year so much of the twenty-five per centum of net earnings required to be paid into the sinking-fund, as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

"SECT. 6. That no dividend shall be voted, made, or paid for or to any stockholder or stockholders, in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums required as aforesaid to be paid into said sinking-fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon any debt the lien of which, or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking-fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any

such dividend, contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $10,000, and by imprisonment not exceeding one year.

"SECT. 7. That the said sinking-fund so established and accumulated shall, at the maturity of said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof, according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon, and not reimbursed, subject to the provisions of the next section.

"SECT. 8. That said sinking-fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking-fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having any claim upon said sinking-fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of discharging, out of other funds, its debts to any creditor except the United States.

"SECT. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the treasury, or into said sinking-fund under this act, or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper, and lawful course

of their current business, in good faith and for valuable consideration.

"SECT. 10. That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceeding against the said several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.

"SECT. 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants, and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney-General to cause such forfeiture to be judicially enforced.

"SECT. 12. That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal, as, in the opinion of Congress, justice or the public welfare may require. And nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in favor of the United States.

"SECT. 13. That each and every of the provisions in this act contained shall severally and respectively be deemed, taken, and held as in alteration and amendment of said act of eighteen hundred and sixty-two and of said act of eighteen hundred and sixty-four respectively, and of both said acts."

The legislature of California, April 4, 1864, passed the following act (Stat. for 1863–64, p. 471): —

"*An Act to aid in carrying out the Pacific Railroad and Telegraph Act of Congress and other matters relating thereto.*

"The people of the State of California, represented in Senate and Assembly, do enact as follows: —

"SECT. 1. Whereas, by the provisions of an act of Congress, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862,' the Central Pacific Railroad Company of California is authorized to construct a railroad and telegraph line in the State of California, and in the Territories lying east of said State towards the Missouri River; therefore, to enable the said company more fully and completely to comply with and perform the provisions and conditions of said act of Congress, the said company, their successors and assigns, are hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them to construct, maintain, and operate the said railroad and telegraph line not only in the State of California, but also in the said Territories lying east of and between said State and the Missouri River, with such branches and extensions of said railroad and telegraph line, or either of them, as said company may deem necessary or proper; and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over, and along any streets, roads, highways, rivers, streams, waters, and watercourses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; and also the right to condemn and appropriate to the use of said company such private property, rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said railroad and telegraph, the compensation therefor to be ascertained and paid under and by special proceedings, as prescribed in the act providing for the incorporation of railroad companies, approved March 20, 1861, and the acts supplementary and amendatory thereof; said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph; hereby confirming to and vesting in said company all the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in said company by said act of Congress; hereby repealing all laws and parts of

laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted.

"SECT. 2. This act shall take effect and be in force from and after its passage."

The State of Nevada, March 9, 1866 (the Territory of that name having in the mean time become a State), passed, *mutatis mutandis*, a similar act. It will be found in the laws of that State for 1866, c. 112.

The cases were heard at the same time.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for the Union Pacific Railroad Company.

The Attorney-General and *Mr. Edwin B. Smith*, Assistant Attorney-General, for the United States.

Mr. Benjamin H. Hill and *Mr. S. W. Sanderson* for the Central Pacific Railroad Company, and *Mr. George H. Williams* for Gallatin.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The single question presented by the case of the Union Pacific Railroad Company is as to the constitutionality of that part of the act of May 7, 1878, which establishes in the treasury of the United States a sinking-fund. The validity of the rest of the act is not necessarily involved.

It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohib-

ited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

The contract of the company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one-half the compensation for transportation and other services rendered for the government, and the five per cent of net earnings as specified in the charter. This was decided in *Union Pacific Railroad Co.* v. *United States*, 91 U. S. 72. The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights.

This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *Chicago, Burlington, & Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155.

It is unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the act of 1862, sect. 18, it was accompanied by an explan-

story statement showing that this had been done "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but especially in time of war) the use and benefits of the same for postal, military, and other purposes," and by an injunction that it should be used with "due regard for the rights of said companies." In the act of 1864, however, there is nothing except the simple words (sect. 22) "that Congress may at any time alter, amend, and repeal this act." Taking both acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller* v. *The State* (15 Wall. 498), "it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;" and again, in *Holyoke Company* v. *Lyman* (id. 519), "to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson* v. *Jessup* (id. 459), he said, "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company* v. *Maine* (96 U. S. 510), "by the reservation . . . the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company,

formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swayne, in *Shields* v. *Ohio* (95 U. S. 324), says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority. Further citations are unnecessary.

Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking-fund to meet it at maturity. Not having done so at first, it cannot now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.

Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because

it impaired the obligations of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without laying by any thing to meet losses, would any one doubt the power of the State under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

Such a regulation, instead of being destructive in its character, would be eminently conservative. Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. A large amount of money is required for construction and equipment, and this to a great extent is represented by a funded debt, which, as well as the capital stock, is sought after for investment, and is distributed widely among large numbers of persons. Almost as a matter of necessity it is difficult to secure any concert of action among the different classes of creditors and stockholders, and consequently all are compelled to trust in a great degree to the management of the corporation by those who are elected as officers, without much, if any, opportunity for personal supervision. The interest of the stockholders, who, as a rule, alone have the power to select the managers, is not unfrequently antagonistic to those of the debt-holders, and it therefore is especially proper that the government, whose creature the corporation is, should exercise its general powers of supervision and do all it reasonably may to protect investments in the

bonds and stock from loss through improvident management.

No better case can be found for illustration than is presented by the history of this corporation. Without undertaking in any manner to cast censure upon those by whose matchless energy this great road was built and, as if by magic, put into operation, it is a fact which cannot be denied, that, when the road was in a condition to be run, its bonds and stocks represented vastly more than the actual cost of the labor and material which went into its construction. Great undertakings like this, whose future is at the time uncertain, requiring as they do large amounts of money to carry them on, seem to make it necessary that extraordinary inducements should be held out to capitalists to enter upon them, since a failure is almost sure to involve those who make the venture in financial ruin. It is not, however, the past with which we are now to deal, but rather the present and the future. We are not sitting in judgment upon the history of this corporation, but upon its present condition. We now know that when the road was completed its funded debt alone was as follows: First mortgage, $27,232,000, subsidy bonds, $27,236,512, all maturing thirty years after date, and that the average time of its maturity is during the year 1897. In addition to this are now the sinking-fund bonds, the land-grant bonds, and the Omaha-bridge bonds, amounting to at least $20,000,000 more. The interest on the first mortgage and all other classes of bonds, except the subsidy bonds, will undoubtedly be met as it falls due; but on the subsidy bonds, as has already been seen, no interest is payable, except out of the half of the earnings for government service and the five per cent of net earnings, until the maturity of the principal. Thus far, as we have had occasion to observe in the various suits which have come before us during the past few years, involving an inquiry into these matters, the payments from these sources have fallen very far short of keeping down the accruing interest, and according to present appearances it is not probably too much to say that when the debt is due there will be as much owing the United States for interest paid as for principal. There will then become due from this company, in less than twenty years from this date, in the neigh-

borhood of $80,000,000, secured by the first and subsidy mortgages. In addition to this are the capital stock, representing $36,000,000 more, and the funded debt inferior in its lien to that of the subsidy bonds. All these different classes of securities have become favorites in the market for investments, and they are widely scattered at home and abroad. They have taken to a certain extent the place of the public funds as investments. With the exception of the land-grant, which is first devoted to the payment of the land-grant bonds, but little if any thing except the earnings of the company can be depended on to meet these obligations when they mature. The company has been in the receipt of large earnings since the completion of its road, and, after paying the interest on its own bonds at maturity, has been dividing the remainder, or a very considerable portion of it, from time to time among its stockholders, without laying by any thing to meet the enormous debt which, considering the amount, is so soon to become due. It is easy to see that in this way the stockholders of the present time are receiving in the shape of dividends that which those of the future may be compelled to lose. It is hardly to be presumed that this great weight of pecuniary obligation can be removed without interfering with dividends hereafter, unless at once some preparation is made by sinking-fund or otherwise to prevent it. Under these circumstances, the stockholders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation, and the stockholders, as such, have no right to them as against the just demands of creditors.

The United States occupy towards this corporation a two-fold relation, — that of sovereign and that of creditor. *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lienholders

and stockholders, it is not only their right, but their duty, as sovereign to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law.

The question still remains, whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking-fund for the payment of debts when they mature, but does not pay the debts. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

To our minds it is a matter of no consequence that the Secretary of the Treasury is made the sinking-fund agent and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking-fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.

Neither is it a fatal objection that the half of the earnings for services rendered the government, which by the act of 1864 was to be paid to the companies, is put into this fund. The government is not released from the payment. While the money is retained, it is only that it may be put into the fund, which, although kept in the treasury, is owned by the company. When the debts are paid, the securities into which the moneys have been converted that remain undisposed of must be handed over to the corporation. Under the circumstances, the retaining of the money in the treasury as part of the sinking-fund is in law a payment to the company.

Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. It takes nothing from the corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securi ties.

The legislation is also warranted under the authority by way of amendment to change or modify the rights, privileges, and immunities granted by the charter. The right of the stockholders to a division of the earnings of the corporation is a privilege derived from the charter. When the charter and its amendments first became laws, and the work on the road was undertaken, it was by no means sure that the enterprise would prove a financial success. No statutory restraint was then put upon the power of declaring dividends. It was not certain that the stock would ever find a place on the list of marketable securities, or that there would be any bonds subsequent in lien to that of the United States which could need legislative or other protection. Hence, all this was left unprovided for in the charter and its amendments as originally granted, and the reservation of the power of amendment inserted so as to enable the government to accommodate its legislation to the require-

ments of the public and the corporation as they should be developed in the future. Now it is known that the stock of the company has found its way to the markets of the world; that large issues of bonds have been made beyond what was originally contemplated, and that the company has gone on for years dividing its earnings without any regard to its increasing debt, or to the protection of those whose rights may be endangered if this practice is permitted to continue. For this reason Congress has interfered, and, under its reserved power, limited the privilege of declaring dividends on current earnings, so as to confine the stockholders to what is left after suitable provision has been made for the protection of creditors and stockholders against the disastrous consequences of a constantly increasing debt. As this increase cannot be kept down by payment unless voluntarily made by the corporation, the next best thing has been done, that is to say, a fund safely invested, which increases as the debt increases, has been established and set apart to meet the debt when the time comes that payment can be required.

The only material difference between the Central Pacific Company and the Union Pacific lies in the fact that in the case of the Central Pacific the special franchises, as well as the land and subsidy bonds, were granted by the United States to a corporation formed and organized under the laws of California, while in that of the Union Pacific Congress created the corporation to which the grants were made. The California corporation was organized under a State law with an authorized capital of $8,500,000, to build a road from the city of Sacramento to the eastern boundary of the State, a distance of about one hundred and fifteen miles. Under the operation of its California charter, it could only borrow money to an amount not exceeding the capital stock, and must provide a sinking-fund for the ultimate redemption of the bonds. Hittell's Cal. Laws, 1850–64, sect. 840. No power was granted to build any road outside the State, or in the State except between the termini named. By the act of 1862, Congress granted this corporation the right to build a road from San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of the State, and from there through

the Territories of the United States until it met the road of the Union Pacific Company. For this purpose all the rights, privileges, and franchises were given this company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land-grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed, before it could become entitled to the benefits conferred by the act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment.

No objection has ever been made by the State to this action by Congress. On the contrary, the State, by implication at least, has given its assent to what was done, for in 1864 it passed "An Act to aid in carrying out the provisions of the Pacific railroad and telegraph act of Congress," and thereby confirmed and vested in the company "all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said act of Congress," and repealed "all laws or parts of laws inconsistent or in conflict with . . . the rights and privileges herein (therein) granted." Hittell's Laws, sect. 4798; Acts of 1863–64, 471. Inasmuch as by the Constitution of California then in force (art. 4, sect. 31) corporations, except for municipal purposes, could not be created by special act, but must be formed under general laws, the legal effect of this act is probably little more than a legislative recognition by the State of what had been done by the United States with one of the State corporations.

In so doing, the State but carried out its original policy in reference to the same subject-matter, for as early as May 1, 1852, an act was passed reciting "that the interests of this State, as well as those of the whole Union, require the immediate action of the government of the United States, for the construction of a national thoroughfare connecting the naviga-

ble waters of the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war, and to promote the highest commercial interests of the Republic," and granting the right of way through the State to the United States for the purpose of constructing such a road. Hittell's Laws, sect. 4791; Acts of 1852, 150. In 1859 (Acts of 1859, 391), a resolution was passed calling a convention "to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said railroad can be accomplished;" and at the same session of the legislature a memorial was prepared asking Congress to pass a law authorizing the construction of such a road, and asking also a grant of lands to aid in the construction of railroads in the State. Acts of 1859, 395. Nothing was done, however, by Congress until the Rebellion, which at once called the attention of all who were interested in the preservation of the Union to the immense practical importance of such a road for military purposes, and then, as soon as a plan could be matured and the necessary forms of legislation gone through with, the act of July 1, 1862, was passed. But this was not enough to interest capitalists in the undertaking, and although the legislature of California during the year 1863 passed several acts intended to hold out further inducements, but little was accomplished until the amendatory act of Congress in 1864, which, besides authorizing the first mortgage, and changing in some important particulars the conditions on which the subsidy bonds were to be issued, conferred additional powers on the corporation, some of which, such as the right of eminent domain in the Territories, the State could not grant, and others, such as the right of issuing first-mortgage bonds without a sinking-fund, and in excess of the capital stock, it had seen fit to withhold. This act also reserved to Congress full power of amendment, and was promptly accepted by the corporation. With this addition of corporate powers and pecuniary resources the work was pushed forward to completion with unexampled energy. But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built. The first-mortgage bonded debt was created without a sinking-fund, and the road

in the Territories built under the authority of Congress, assented to and ratified by the State.

The Western Pacific Company, now, by consolidation, a part of the Central Pacific Company, was also organized, Dec. 18, 1862 (Acts of 1863, 81), under the general railroad law of California, with power to construct a road from a point on the San Francisco and San José Railroad, at or near San José, to Sacramento, and there connect with the road of the Central Pacific Company. Afterwards the Central Pacific Company assigned to this corporation its rights, under the act of Congress, to construct the road between San José and Sacramento; and this assignment was ratified by Congress, "with all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof." 13 Stat. 504. By the same act further privileges were granted by the United States both to the Central Pacific and Western Pacific Companies, in respect to their issue of first-mortgage bonds.

Under this legislation, we are of the opinion that, to the extent of the powers, rights, privileges, and immunities granted these corporations by the United States, Congress retains the right of amendment, and that in this way it may regulate the administration of the affairs of the company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements of the original State charter, as modified by the State Aid Act of 1864, accepting what had been done by Congress. This is as far as it is necessary to go now. It will be time enough to consider what more may be done when the necessity arises. As yet, the State has not attempted to interfere with the action of Congress. All complaint thus far has come from the corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend.

It is clear that the establishment of a sinking-fund by the act of 1878 is not at all in conflict with any thing contained in the original State charter, for by that charter no such debt could be created without provision for such a fund. This part of the act of 1878 is, therefore, in the exact line of the policy

of the State, and does no more than place the company again, to some extent, under obligations from which it had been released by congressional legislation. So, too, the reservation of the power of amendment by Congress is equally consistent with the settled policy of the State; for not only the State charter, in terms, makes such a reservation in favor of the State, but the Constitution expressly provides that all laws for the creation of corporations "may be altered from time to time, or repealed." Art. 4, sect. 31.

It is not necessary now to inquire whether, in ascertaining the net earnings of the company for the purpose of fixing the amount of the annual contributions to the sinking-fund, the earnings of all the roads owned by the present corporation are to be taken into the account, or only of those in aid of which the land-grants were made and the subsidy bonds issued. The question here is only as to the power of Congress to establish the fund at all. If disputes should ever arise as to the manner of stating the accounts, they can be settled at some future time.

Judgment affirmed.
Decree affirmed.

MR. JUSTICE FIELD, MR. JUSTICE STRONG, and MR. JUSTICE BRADLEY, dissented.

MR. JUSTICE STRONG. In my opinion, the act of Congress of May 7, 1878, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of Jan. 20, 1795, "when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." 3 Hamilton's Works, 518, 519. Opinions similar to this have often found expression in judicial decisions, even in those of this court. If this

be sound doctrine, it is as much beyond the power of a legislature, under any pretence, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.

The contracts of the government with the Union Pacific Railroad Company and with the Central Pacific, which the act of Congress of 1878 has in view, were not made by the act of 1862, the act chartering the former company, nor by the amending act of 1864. They were made after those acts had been accepted by the companies, and after their chartered rights had been completely acquired. There was no agreement of the companies to repay the loan of government bonds made to them, until the bonds were issued and delivered. The companies were under no obligation to accept the loan and assume the liability resulting from its acceptance. The contracts, therefore, are no part of the charter of the Union Pacific Company, and no part of the acts of 1862 or 1864. They are subsequent to those acts and independent of them. It is true Congress authorized the loan. It made the companies offers to lend upon certain conditions; and when those offers and conditions were subsequently accepted, the contracts of loan were made. Not until then. Before that time there was nothing but an unaccepted offer.

What, then, was the contract when it was made? The government lent its bonds, and, in consideration of the loan, each company assumed five obligations: 1st, to pay the bonds at their maturity, that is, at the expiration of thirty years; 2d, to keep the railroad and telegraph line in repair and use; 3d, to furnish transmission of despatches and transportation for the government at reasonable rates, allowing it a preference for such purposes; 4th, to apply to the payment of the bonds and interest half the compensation due to it from the government for services rendered, until the whole amount of the loan is fully paid; and, 5th, after the completion of the railroad, to apply to the payment of the bonds at least five per cent annu-

ally of its net earnings. The lender required and the borrower undertook nothing more.

It is manifest that by this contract the government acquired a vested right to payment at the time and in the mode specified, as well as to preference of transportation and transmission of despatches; and the company acquired a vested right to retain the consideration given for its assumption, — that is, a vested right to withhold payment until by the terms of the contract payment became due. The contract implied an agreement not to call for payment or additional security before that time. I cannot conceive of any rational doubt of this. There is no technicality about vested rights. Most of them grow out of contracts, and, no matter how they arise, they are all equally sacred, equally beyond the reach of legislative interference. A vested right of action is property in the same sense in which rights to tangible things are, and is equally protected. Whether it springs from contract or from other rules of the common law, it is not competent for the legislature to take it away. If we look at what must have been the understanding of all parties to these contracts of loan, the rights created and vested under them cannot be in doubt. The government sought to induce private adventurers to construct a railroad and telegraph line to the Pacific Ocean, — a work which necessarily required years and immense expenditures for its accomplishment. A loan, repayable on call or within a short time, would have been no inducement. Had it been dreamed that a call could have been made at any time thereafter designated by Congress, it is inconceivable that the loan proffered would have been accepted. It would have furnished no reliable basis for an attempt to build the road. The parties could not so have understood the bargain. The bonds were required to be paid by the companies only at their maturity, except so far as half-payment for governmental service, and five per cent of the net earnings, after the completion of the road, might pay. The contract, therefore, means exactly what it would have meant had it contained the express stipulation: "The United States shall not require payment of the amount of the bonds, or any part thereof (except half-compensation for services, and five per cent of net earnings), until the expiration of thirty years from

their issue to the company, or date, nor shall additional security be required, beyond the lien reserved." Such was the contract. It was not one of the franchises granted in the charter of the Union Pacific or the Central Pacific, but it was a business transaction, differing in nothing, except parties, from what it would have been if it had been made between two private individuals. It is true Congress authorized the loan on the terms upon which it was made; but, as I have said, the contract was not made by the act of Congress, or with Congress. It was a subsequent transaction, and the United States became a party to it, not in its sovereign character, but as a civil corporation, as said by Mr. Hamilton, with the same rights and obligations as a private person, and no more.

Now, what has been attempted by the act of May 7, 1878? That act was passed with sole reference to this contract, and all its provisions have in view the imposition of additional obligations upon the railroad company. It does not purport to be a repeal of the charter. Its leading purpose is to take control of the property of the debtor, and sequester it for the security of a debt, which, by the terms of the contract, is not due and payable for years to come. I shall not go over all its pro visions. It will be sufficient to notice some of the more prominent ones, which, if they are ruled to be operative, greatly change the contract which the parties made when the bonds were delivered and accepted, when the contract was closed, and which impose new and oppressive obligations upon the debtor.

By the contract only one-half the compensation for services rendered to the government was required to be applied to the payment of the bonds, but by this act the whole amount of the compensation which may from time to time be due for services rendered to the government is directed to be retained by the United States, and, at the same time, the obligation to render those services is continued. By the third section of the act a sinking-fund is established in the treasury of the United States, that is, in the treasury of the creditor; and the fourth section enacts that there shall be carried into that fund, on the first day of February in each year, the one-half of the compensation above

named, not applied in liquidation of interest. By the contract the debtor was bound to pay only five per cent of its net earnings, after the completion of the road, annually to the creditor; but this act requires the debtor to pay into the creditor's treasury, to the credit of the sinking-fund, twenty-five per cent of its whole net earnings, on the 1st of February in each year. The act further directs that the sinking-fund thus created shall, with its accumulations, be invested in bonds of the United States, and at the maturity of the bonds loaned to the debtor be applied to the payment and satisfaction thereof, and of all interest paid by the United States. There are other provisions of this act intended to enforce compliance with these newly added obligations imposed upon the debtor, as also provisions that the sinking-fund shall be held for the benefit, protection, and security of other lien-creditors of the debtor. But I deem it unnecessary to mention them in detail. Those which I have mentioned are enough for the present case. No one can deny that they materially change the contract of loan and borrowing previously existing between the government and the railroad companies, and change it at the will of the creditor alone. Nor can it be denied that they impose upon the debtors new and onerous burdens that they never agreed to assume. Practically, they enforce payment of the debt before, by the terms of the contract, it is due. The act seizes the half-compensation, which the government agreed should not be retained, and covers it into the treasury, appropriating it to the payment of the debt. For nothing else can it be used. The act also requires payment into the treasury of twenty-five per cent of the net earnings of the company, instead of five per cent only, as stipulated when the contract was made. It is true it does not make immediate application of the sums thus withheld and demanded to the extinguishment of the debt. It declares that they shall be applied to the payment of the debt and interest "at the maturity of the bonds." But this is a distinction without a difference, obviously made to evade what it was known could not lawfully be done. An immediate application might as well have been directed. It would probably be better for the debtor if the application were immediately made. The money is taken from the debtor, withdrawn entirely from the

debtor's control and use, and put into the treasury of the creditor, and there left to the mere agreement of the creditor to apply it to payment. I apprehend no plain man of common sense will hesitate to conclude that this is exacting payment before the debt is due. If A. borrows from B. $1,000, and gives his note therefor, payable at the expiration of five years, and at the end of one year the lender demands that there be placed in his hands by the debtor a sum of money to meet the note when it shall fall due, it will hardly be contended that would not be requiring payment before the debtor was bound to pay. And if such a demand could be enforced, it would be at the expense of the contract. What more is the present case? And were it conceded the act of 1878 does not attempt to enforce the payment before the maturity of the debt, the concession would be of little worth, for it will not be questioned that it attempts to enforce giving additional security for payment beyond that stipulated for in the contract. That is no less a material alteration of the contract, a serious addition to it. The plain truth is, the assertion of such a power is claiming the right to disregard the contract entirely, and substitute for it a different one, without the consent of the debtor. If the United States can exact now one-quarter of the net earnings of each of these companies, and place it in their treasury, they can, by the same power, and with the same reason, exact the whole of the earnings, or any other property equal to the amount of the debt. Was any such thing contemplated by the parties when the contract was made?

Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was necessary; for State legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the eighty-fourth number of the Federalist, "Why declare that things shall not be done which there is no power to

do?" Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to *lessen* the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. Even a bankrupt law cannot be enacted applicable only to single corporations or single debtors. To be constitutional, it must be uniform throughout the United States. I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law, even relieve a debtor to a private party from any duty he has assumed by his contract. Much less can it change the stipulations of the contract and impose additional liabilities upon a contractor with the government. Such an exercise of power would be making a contract for parties to which they never assented. In all the history of congressional legislation before the act of 1878, such a power was never attempted to be exercised.

And not only is such legislative authority not conferred upon Congress by the Constitution, but it is, in effect, expressly denied. The fifth amendment contains restrictions taken, in substance, from Magna Charta. Among them are the provisions that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power. What is due process of law is well understood. It is law in regular course of administration through courts of justice. Coke, 2 Inst. 272; *Murray's Lessee* v. *The Hoboken Land and Improvement Co.*, 18 How. 272. "The terms 'the law of the land,' said Chief Justice Ruffin (*Hoke* v. *Harderson*, 4 Dev. (N. C.) 1), do not mean merely an act of the General Assembly. If they

did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the legislature." p. 15. Yet the act of 1878 does attempt by its own force, and without any judicial action, not only to change a contract and increase its obligations, but also to deprive the railroad companies of their property. What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the property. The subject may be corporeal or incorporeal. A right in action is as completely property as is a title to land. A very large portion of the property of the country consists in rights attendant upon contract. The right of a promisee to demand payment when the note falls due is a right of property; and equally so is the right of the promisor to hold, as against his promisee, the consideration for the promise until the time stipulated in the note for payment. The promisee has no right to enforce payment, or to enforce giving security for it, if none was promised in the contract. Such a right is no portion of his property, and it can be enforced only at the expense of a clear right of the promisor. On the other hand, the promisor has a right to exemption from liability to give such security. It is incident to his contract. Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the fifth amendment to the Constitution.

I notice another consideration which, to my mind, is not without weight. It may, I think, well be doubted whether the act of 1878 is even an attempted exercise of legislative power. A statute undertaking to take the property of A. and transfer it to B. is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the government. The act of Congress is little, if any, more. It does not purport to be a general law. It does not apply to all corporations or to all debtors of the government. It singles out two corporations, debtors of the government, by name, and prescribes for them as debtors new duties to their creditor. It thus at

tempts to perform the functions of a court. This, I cannot but think, is outside of legislative action and power.

I turn now to the arguments by which the constitutionality of the act of Congress has been attempted to be supported. It is said that, though Congress cannot directly abrogate contracts, or impair their obligation, it may indirectly, by the exercise of other powers granted to it. This I have conceded, but I deny that an acknowledged power can be exerted solely for the purpose of effecting indirectly an unconstitutional end which the legislature cannot directly attempt to reach. If the purpose were declared in the act, I think no court would hesitate to pronounce the act void. In *Hoke* v. *Harderson*, to which I have referred, Chief Justice Ruffin, when considering at length an argument that a legislature could purposely do indirectly what it could not do directly, used this strong lan guage: "The argument is unsound in this, that it supposes (what cannot be admitted as a supposition) the legislature will, designedly and wilfully, violate the Constitution, in utter disregard of their oaths and duty. To do indirectly in the abused exercise of an acknowledged power, not given for, but perverted for that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the Constitution."

It is unnecessary, however, to enlarge upon this, for the effect wrought upon the contracts of these two companies is a direct effect, — a direct alteration of the obligation assumed by the debtors, and not an incidental result of legislation upon some other subject over which Congress has a right to legislate. It is too plain to admit of any doubt that the sole object of the act of 1878 was to enforce giving new and additional security for the payment of the subsidy bonds at their maturity. All its provisions aim directly at that, and the new terms thereby added to the contract have that end solely in view.

In further attempted support of the validity of the act, it has been denied that it does change the contract, because it does not require the application of the additional payments to the satisfaction of the debt before its maturity. I have, perhaps, said enough upon this subject. The argument can hardly be seriously made. The act does compel the debtors to surren-

der possession of their property to the creditor before the time when, by the terms of the contract, they were under obligation to part with it. The debtors are no longer permitted to hold and use one-half the compensation due presently from the government for services rendered, and are no longer at liberty to use all their net income or earnings, except five per cent, at their discretion. One quarter of their net earnings they are compelled to surrender to the creditor. Thus the creditor becomes the custodian of the debtors' property, and acquires a right to hold and manage it as if it were his own. It is absurd to say this is not practically a radical change in the relations between the parties established by the contract. And it is equally impossible to maintain that it is not depriving the debtors of their property without due process of law.

I turn now to what has been most relied upon in support of the validity of the act. I refer to the clauses in the acts of 1862 and 1864, reserving the right to repeal, amend, or alter. There are two such, — one in the act of 1862, and one in that of 1864. That in the latter act is the broadest, and it is as follows: "Congress may at any time alter, amend, or repeal this act." The power thus reserved is one over the act itself, not over any thing that may have lawfully been done under the act, before its repeal or alteration. It is only by great confusion of things essentially distinct that this power can be construed as applicable to a contract made after the corporation came into existence. Besides, the act of 1878 does not attempt to repeal, or alter or amend, the acts of 1862 and 1864. It changes no franchise granted by those acts, nor does it interfere with its exercise. It interferes only with the fruits of the franchise. The right to possess and enjoy the income of the company is not a franchise. It is an incident of the ownership of the company's property, though the property may be accumulated by the use of the franchise. Concede that Congress has power to regulate the tolls on the railroad, or in some other mode to restrict the use of the franchise, and thus lessen the income, yet the income, whether large or small when made, is the company's property, and, like other property, protected against being taken without due process of law. Or suppose the acts of 1862 and 1864 were repealed, and thus all the fran-

chises granted by them were taken away, the property of the company would remain, and the income thereof, though greatly decreased, would be the property of the stockholders. Nobody denies that. Is the lesser greater than the whole? I repeat, therefore, the act of 1878 is no exercise of the reserved power to alter, amend, or repeal the acts of 1862 and 1864. It is no attempt to make any such repeal or amendment. It is at most an attempt to seize the fruits of the franchise after they shall have become the vested property of the corporations. It is an attempt to sequester the income of the property owned by them. As well might the government attempt to seize and put into its treasury the rents, issues, and profits of the lands granted to them by the third and fourth sections of the act of 1862, and call that an amendment of the act. There is no distinction to be made between the profits of the road and telegraph line and the rents of the lands. None has been attempted.

But if the act of 1878 could be considered an alteration or amendment of the acts of 1862 and 1864, the question would still remain, what was the extent of the power reserved by those acts. I mean the power to alter, amend, or repeal them. All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: It must be exercised, when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold the grantee to the performance of the duties assumed, — the consideration given for the grant. Nor can it mean to continue in the legislative power which the legislature never possessed, and which it is constitutionally incapable of exercising. A partial definition of the limits of the reserved power may be found in *Commonwealth* v. *Essex Company* (13 Gray (Mass.), 239), where Chief Justice Shaw (speaking of the reserved power to alter, amend, or repeal a charter), said: "It seems to us this power must have some limit, though it is difficult to define it. Suppose authority has been given by law to a railroad corporation to purchase a lot of land and hold it for purposes connected with its business, and they purchase such lot from a third person, could the legis-

lature prohibit the company from holding it? If so, in whom would it vest? Or could the legislature direct it to revert to the grantor or escheat to the public? Or how otherwise? Suppose a manufacturing company, incorporated, is authorized to construct a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid, can the legislature afterwards alter the act of incorporation so as to give to such meadow owners future annual damages? Perhaps from these extreme cases, for extreme cases are allowable to test a legal principle, the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." p. 253. This rule has been recognized ever since. *Vide Sage* v. *Dillard*, 15 B. Mon. (Ky.) 349. It has been adopted by this court. In *Miller* v. *The State* (15 Wall. 478), it was said by Mr. Justice Clifford: "Power to legislate founded upon such a reservation in a charter of a private corporation is certainly not without limits, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation." To the same effect is *Holyoke Company* v. *Lyman*, id. 500. If this limitation be admitted, it is impossible to see how a reserved power to alter, amend, or repeal an act granting a private charter can include a right to change the stipulations of a contract made under that charter, or to sequester for any purpose the property of the company acquired while the charter remains unrepealed and unaltered. If the acts of 1862 and 1864 were repealed, would not the contract of loan remain unaffected thereby? Can a legislature that offers a contract on certain terms change those terms after they have been accepted and after the contract has been perfected? Yet that is what the act of 1878 attempts to do. A principal who has authorized his agent to make a contract for him may revoke or restrict the agency before any contract is made, but he is bound by a contract made during the continuance of the agent's powers, if those powers were not transgressed in making it. He cannot afterwards repudiate its

terms or add to them. I see no essential difference between such a case and the present. I cannot confound an alteration of the acts of 1862 and 1864 with an alteration of a subsequent commercial contract authorized by those acts, and made between the United States and companies chartered by them. My conviction, therefore, is, that the act of 1878 cannot be defended as a legitimate exercise of the powers reserved to Congress.

I need not say it cannot rest upon what is generally denominated the visitatorial power of the government over its own corporations, though it is upon this power the opinion of the majority of the court largely relies. That power is applicable only to eleemosynary corporations, such as colleges, schools, and hospitals, and the visitation is always through the medium of courts of justice. It is judicial and not legislative. 2 Kent, Com., Lect. 23, sect. 4. To claim, therefore, that, by virtue of that power, a private business corporation can be compelled by legislative action to establish a sinking-fund for the payment of its debts, and deposit it in the treasury of its creditor, is totally inadmissible.

There are, undoubtedly, many cases to be found in which it has been decided that, by virtue of such a reservation as that contained in the acts of 1862 and 1864, a legislature may make new regulations, to some extent, of the action of corporations created by it, — such as prescribing a new measure of tolls, increasing the capital of insurance companies, repealing an exemption from taxation, and the like. So, without the reservations, some new regulations may be prescribed in the exercise of the police power. They are all regulations of the franchise or of its use, — not invasions of rights or property acquired under the franchise subsequently to its grant; and not one of them under the practice of amendment or rightful regulation has undertaken to change or vary any contract the corporation had made, or to control possession of property acquired. The act of 1878 is, I believe, the first assertion of any such force in the reservation. It is a very grave and dangerous assertion. It is especially dangerous in these days of attempted repudiation, when the good faith of the government is above all price. If it can be maintained, the government is no longer bound by

any commercial contract into which it may enter with these corporations, though it holds them bound. I cannot assent to any such doctrine; and upon the whole, in my opinion, the act of 1878 is not only unauthorized by any power existing in Congress, but it is an infraction of the prohibition I have pointed out, contained in the fifth amendment of the Constitution.

Most of what I have said is applicable to each of the cases, — that of the Union Pacific and that of the Central. There are some other considerations peculiar in the case of the Central Pacific, which is a corporation of the State of California, and was such in 1862. These I leave for consideration by my brethren who unite with me in dissent

MR. JUSTICE BRADLEY. I am unable to concur in the judgment of the court in these cases, and will very briefly state the grounds of my dissent.

I think that Congress had no power to pass the act of May 7, 1878, either as it regards the Union Pacific or the Central Pacific Railroad Company. The power of Congress, even over those subjects upon which it has the right to legislate, is not despotic, but is subject to certain constitutional limitations. One of these is, that no person shall be deprived of life, liberty, or property without due process of law; another is, that private property shall not be taken for public use without just compensation; and a third is, that the judicial power of the United States is vested in the supreme and inferior courts, and not in Congress. It seems to me that the law in question is violative of all these restrictions, — of their spirit at least, if not of their letter; and a law which violates the spirit of the Constitution is as much unconstitutional as one that violates its letter. For example, although the Constitution declares only that private property shall not be taken for public use without just compensation, and does not expressly declare that it shall not be taken for private use without compensation, or, in other words, does not declare that the property of one person shall not be taken from him and given to another without compensation, yet no one can reasonably doubt that a law which should do this would be unconstitutional, because the prohibition to do

it is within the spirit of the prohibition that is given, it being the greater enormity of the two.

The contract between the Union and Central Pacific Railroad Companies and the government was an executed contract, and a definite one. It was in effect this: that the government should loan the companies certain moneys, and that the companies should have a certain period of time to repay the amount, the loan resting on the security of the companies' works. Congress, by the law in question, without any change of circumstances, and against the protest of the companies, declares that the money shall be paid at an earlier day, and that the contract shall be changed *pro tanto*. This is the substance and effect of the law. Calling the money paid a sinking-fund makes no substantial difference. The pretence or excuse for the law is that the stipulated security is not good. Congress takes up the question, *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution, and to subject the companies to heavy penalties if they do not comply. That is the plain English of the law. In view of the limitations referred to, has Congress the power to do this? In my judgment it has not. The law virtually deprives the companies of their property without due process of law; takes it for public use without compensation; and operates as an exercise by Congress of the judicial power of the government.

That it is a plain and flat violation of the contract there can be no reasonable doubt. But it is said that Congress is not subject to any inhibition against passing laws impairing the validity of contracts. This is true; and the reason why the inhibition to that effect was imposed upon the States and not upon Congress evidently was, that the power to pass bankrupt laws should be exclusively vested in Congress, in order that the bankruptcy system might be uniform throughout the United States. When the States exercised the power, they often did it in such a manner as to favor their own citizens at the expense of the citizens of other States and of foreign countries. It was deemed expedient, therefore, to take the power from the States so far as it might involve the impairing the validity of contracts. State bankrupt laws, since the Constitution went into effect, have only been sustained when operating prospec-

tively upon contracts, and then only in the absence of a national law. The inhibition referred to undoubtedly had its origin in these considerations. It fully explains the fact that no such inhibition was laid upon the national legislature; and the absence of such an inhibition, therefore, furnishes no ground of argument in favor of the proposition that Congress may pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation. The limitations already quoted exist in their full force, and apply to that subject as well as to all others. They embody the essential principles of Magna Charta, and are especially binding upon the legislative department of the government. Under the English Constitution, notwithstanding the theoretical omnipotence of Parliament, such a law as the one in question would not be tolerated for a moment. The famous denunciation that "it would cut every Englishman to the bone," would be promptly reiterated.

It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled. That it will be entitled by the contract to a like amount at some future time does not matter. Time is a part of the contract. To coerce a delivery of the money is to coerce without right a delivery of that which is not the property of the government, but the property of the companies. It is needless to refer to the importance to the companies of the time which the contract gives. If it be alleged that the security of the government requires this to be done in consequence of waste or dissipation by the companies of the mortgage security, that is a question to be decided by judicial investigation with opportunity of defence. A prejudgment of the question by the Legislative Department is a usurpation of the judicial power.

But if it were not, as it is, an actual or physical taking of property, — if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or

to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.

The case bears no analogy to the laws which were passed in time of war and public necessity, making treasury notes of the government a legal tender. The power to pass those laws was found in other parts of the Constitution: in the power to borrow money on the credit of the United States, to regulate the value of money, to raise and support armies, to suppress insurrections, and to pass all laws necessary and proper for carrying into execution the general powers of the government. My views on that subject were fully expressed in the *Legal-Tender Cases*, reported in 11 Wallace, and I have yet seen no reason to modify them. The legal-tender laws may have indirectly affected contracts, but did not abrogate them. The case before us is totally different. It is a direct abrogation of a contract, and that, too, of a contract of the government itself, — a repudiation of its own contract.

Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases*, reported in 94 U. S. under the names of *Munn* v. *Illinois*, &c. The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power. It is obvious that the present case does not belong to that category. It is an individual case of private contract between the companies and the government. It is a question of dollars and cents, and terms and conditions, in a particular case. To call the law an exercise of the police power would be a misuse of terms.

Great stress, however, is laid upon the reservation in the charter of the right to amend, alter, or repeal the act.

As a matter of fact, the reservation referred to really has no office in an act of Congress; for Congress is not subject, as the States are, to the inhibition against passing any law impairing the obligation of contracts. It has become so much the custom

to insert it in all charters at the present day, that its original intent and purpose are sometimes forgotten. Since, however, it is contained in the charter of the Union Pacific Railroad Company, it is proper that its meaning and effect should be adverted to.

It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the *Dartmouth College Case*. Mr. Justice Story, in his opinion in that case (4 Wheat. 675), says: "When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises." This hint, that such a reservation would authorize an alteration or amendment to be made in a charter, has been freely availed of by legislatures and constitutional conventions in order to be freed from the constitutional restriction against impairing the validity of contracts, so far as it applied to charters of incorporation. The application of that restriction to such charters, by construing them to be contracts within the meaning of the Constitution, was a surprise to many statesmen and jurists of the country. Chief Justice Marshall, indeed, in his opinion in that case, says: "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into the instrument." p. 644. Probably in view of this somewhat unexpected application of the clause, operating as it did to deprive the States of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend, and repeal a charter; and have sustained some acts of legislation made under such a reservation which are at least questionable.

In my judgment, the reservation is to be interpreted as placing the State legislature back on the same platform of power and control over the charter containing it as it would have

occupied had the constitutional restriction about contracts never existed; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will; but never to violate a contract, or change its terms without the consent of the other party. The reserved power in question is simply that of legislation, — to alter, amend, or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable.

The question then comes back to the extent of the power to legislate. But that is a restricted power, — restricted by other constitutional provisions, to which reference has already been made. Certainly the legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of property without process of law and without compensation.

It may be said that by reason of the reserved power to alter and repeal a charter, this court has sustained legislative acts imposing taxes from which the corporation by the charter was exempted. This is true. But the imposition of taxes is pre-eminently an act of legislation. Its temporary suspension, conceded in a charter, is a suspension of the legislative power *pro tanto*. Being such, a reservation of the right to legislate, or, which is the same thing, to alter, amend, or repeal the charter, necessarily includes the right to resume the power of taxation. The same observations apply to the regulation of fares and freights; for this is a branch of the police power, appli-

cable to all cases which involve a common charge upon the people.

I conclude, therefore, that the power reserved to alter, amend, and repeal the charter of the Union Pacific Railroad Company is not sufficient to authorize the passage of the law in question.

I will only add, further, that the initiation of this species of legislation by Congress is well calculated to excite alarm. It has the effect of announcing to the world, and giving it to be understood, that this government does not consider itself bound by its engagements. It sets the example of repudiation of government obligations. It strikes a blow at the public credit. It asserts the principle that might makes right. It saps the foundations of public morality. Perhaps, however, these are considerations more properly to be addressed to the legislative discretion. But when forced upon the attention by what, in my judgment, is an unconstitutional exercise of legislative power, they have a more than ordinary weight and significance.

MR. JUSTICE FIELD. I also dissent from the judgment of the court in these cases.

The decision will, in my opinion, tend to create insecurity in the title to corporate property in the country. It, in effect, determines that the general government, in its dealings with the Pacific Railroad Companies, is under no legal obligation to fulfil its contracts, and that whether it shall do so is a question of policy and not of duty. It also seems to me to recognize the right of the government to appropriate by legislative decree the earnings of those companies, without judicial inquiry and determination as to its claim to such earnings, thus sanctioning the exercise of judicial functions in its own cases. And in respect to the Central Pacific Company it asserts a supremacy of the Federal over the State government in the control of the corporation which, in my judgment, is subversive of the rights of the State. I therefore am constrained to add some suggestions to those presented by my associates, Justices Strong and Bradley. In what I have to say I shall confine myself chiefly to the case of the Central Pacific Company. That company is a State corporation, and is the successor of a corporation of the same name, created before the railroad acts of Congress were passed,

and of four other corporations organized under the laws of the State. No sovereign attributes possessed by the general government were exercised in calling into existence the original company, or any of the companies with which it is now consolidated. They all derived their powers and capacities from the State, and held them at its will.

The relation of the general government to the Pacific companies is twofold: that of sovereign in its own territory and that of contractor. As sovereign, its power extends to the enforcement of such acts and regulations by the companies as will insure, in the management of their roads, and conduct of their officers in its territory, the safety, convenience, and comfort of the public. It can exercise such control in its territory over all common carriers of passengers and property. As a contractor it is bound by its engagements equally with a private individual; it cannot be relieved from them by any assertion of its sovereign authority.

Its relation to the original Central Pacific Company, and to the present company as its successor, in the construction and equipment of its road, and its use for public purposes, was and is that of a contractor; and the rights and obligations of both are to be measured, as in the case of similar relations between other parties, by the terms and conditions of the contract.

By the first section of the original railroad act of Congress, passed in July, 1862, certain persons therein designated were created a corporation by the name of the Union Pacific Railroad Company, and authorized to construct and operate a continuous railroad and telegraph line from a designated point on the one hundredth meridian of longitude west from Greenwich to the western boundary of Nevada Territory, and were invested with the powers, privileges, and immunities necessary for that purpose, and with such as are usually conferred upon corporations.

By subsequent provisions of the act and the amendatory act of 1864, three grants were made to the company thus created: a grant of a right of way over the public lands of the United States for the road and telegraph line; a grant of ten alternate sections of land on each side of the road, to aid in its construction and that of the telegraph line; and a grant of a certain

number of subsidy bonds of the United States, each in the sum of $1,000 payable in thirty years, with semi-annual interest, — patents for the lands and the bonds to be issued as each twenty consecutive miles of the road and telegraph should be completed. These grants were made upon certain conditions as to the completion of the road and telegraph line, their construction and use by the government, and their pledge as security for the ultimate payment of the bonds. They were the considerations offered by the government to the company for the work which it undertook.

By the act which thus incorporated the Union Pacific Company, and made the grants mentioned, the United States proposed to the Central Pacific that it should construct in like manner a railroad and a telegraph line through the State of California from a point near the Pacific coast to its eastern boundary, upon the same terms and conditions, and after completing them across the State, to continue their construction through the Territories of the United States until they should meet and connect with the road and telegraph line of the Union Pacific.

They, in effect, said to the company, that if it would construct a railroad and a telegraph line from the Pacific Ocean eastward to a connection with the Union Pacific, — the road to be in all respects one of first class, — and keep them in repair, so that they could be used at all times by any department of the government for the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores, at reasonable rates of compensation, not exceeding such as were charged private persons for similar services, and allow the government at all times the preference in the use of the road and telegraph, — they would grant the company a right of way over the public lands for the construction of the road and telegraph line, and grant to it ten alternate sections of land on each side of the road, and give it their bonds, each for the sum of $1,000, payable thirty years after date, with semi-annual interest, such bonds to be issued at the rate of sixteen, thirty-two, or forty-eight the mile, according to the character of the country over which the road should be constructed; and would issue patents for the lands, and the subsidy bonds, as

each twenty consecutive miles of the road and telegraph should be completed in the manner prescribed; it being agreed that the company should pay the bonds as they should mature, and that for the security of their payment they should constitute a second mortgage upon the whole line of the road and telegraph, and that one-half of the compensation earned for services to the government, and, after the completion of the road, five per cent of its net earnings should be retained and applied to the payment of the bonds; and also, that the company should complete the road by the 1st of July, 1876, and keep it in repair and use thereafter, or upon failure to do so, that the government might take possession of the road and complete it, or keep it in repair and use as the case might be. And they further, in effect, said that if these terms and conditions were satisfactory, the company should file its written acceptance thereof with the Secretary of the Interior, within six months thereafter; and that thereupon there should be a contract between them.

This proposition of the government the Central Pacific accepted, and filed its acceptance as required; and thereupon the provisions of the act became a contract between it and the United States, as complete and perfect as could be made by the most formal instrument. The United States thus came under obligation to the company to make the grants and issue the bonds stipulated, upon the construction of the road and telegraph line in the manner prescribed. The corporate capacity of the company in no respect affected the nature of the contract, or made it in any particular different from what it would have been had a natural person been one of the parties. The company was not a creature of the United States, and Congress could neither add to nor subtract from its corporate powers. The exercise of the right of eminent domain allowed in the Territories was not the exercise of a corporate power. That right belongs to the sovereign authority, and whoever exercises it does so as the agent of that sovereignty. Nor was its character as a State institution changed by the fact that it was permitted by Congress to extend its road through the territory of the United States. This permission was no more than the license which is usually extended by positive agreement, or by comity in the absence of such agreement, by one State to the corporations of

another State, to do business and own property in its jurisdiction. Such license is not the source of the corporate powers exercised. Insurance companies, express companies, and, indeed, companies organized for almost every kind of business, are, by comity, permitted throughout the United States, and generally throughout the civilized world, to do business, make contracts, and exercise their corporate powers in a jurisdiction where, in a strict legal sense, they have no corporate existence. The Pacific Mail Steamship Company, for example, to take an illustration mentioned by counsel, is a corporation created under the laws of the State of New York, and, like the Central Pacific, has been subsidized by the United States. Its ships visit Central America, California, Japan, and China, and in all these places it leases or owns wharves, and makes and enforces contracts necessary to the transaction of its business, yet no one has ever pretended or suggested that it derived any of its corporate powers from the United States, or from the authorities of any of the places named. By consent of those authorities, expressed in terms, or implied in what is understood as their comity, it exercises powers derived solely from the State of New York.

When, therefore, Congress assented to the extension into the territory of the United States of the road which the Central Pacific was authorized by its charter to construct in California, it was deemed important for the company to obtain also the consent and authority of the State to act without its limits and assume responsibilities not originally contemplated. Accordingly, in 1864, the legislature of the State, at its second session after the adoption of the original railroad act of Congress, in order to enable the company to comply with its provisions and conditions, authorized the company to construct, maintain, and operate the road in the territory lying east of the State, and invested it with the rights, privileges, and powers granted by the act of Congress, with the reservation, however, that the company should *be subject to all the laws of the State concerning railroad and telegraph lines*, except that messages and property of the United States, of the State, and of the company should have priority of transmission and transportation. The extent of the power which was thus reserved we

shall hereafter consider. It is sufficient at present to observe that it was as ample and complete as it is possible for one sovereignty to exert over institutions of its own creation, and that its exercise is incompatible with the control asserted by the law of Congress of 1878, which has given rise to the present suit.

The Central Pacific Company having accepted, as already stated, the conditions proffered by Congress, proceeded at once to the execution of its contract. In the face of great obstacles, doubts, and uncertainties, its directors commenced and prosecuted the work, and within a period several years less than that prescribed, its telegraph line and road were completed, the latter with all the appurtenances of a first-class road, and were accepted by the government. Patents for the land granted and the subsidy bonds mentioned were accordingly issued to the company. Since then the road and telegraph line have been kept in repair and use, and the government has enjoyed all the privileges in the transmission of despatches over the telegraph, and in the transportation of mails, troops, munitions of war, supplies, and public stores over the road, which were stipulated. There has been no failure on the part of the company to comply with its engagements, nor is any complaint of delinquency or neglect in its action made by the government. The road is more valuable now than on the day of its completion; it has been improved in its rails, bridges, cars, depots, turnouts, machine-shops, and all other appurtenances. Its earnings have been constantly increasing, and it constitutes to-day a far better security to the United States for the ultimate payment of the subsidy bonds than at any period since its completion, and to the government it has caused, with the connecting road of the Union Pacific, an immense saving of expense. The records of the different departments show an annual saving, as compared with previous expenditures, in the item of transportation alone of the mails, troops, and public stores, of $5,000,000, aggregating at this day over $50,000,000.

Whilst the company was thus complying in all respects with its engagements, the act of May 7, 1878, was passed, altering in essential particulars the contract of the company, and greatly increasing its obligations. By the contract, only one-half of the compensation for transportation for the government is to

be retained and applied towards the payment of the bonds. By the act of 1878, the whole of such compensation is to be retained and thus applied. By the contract, five per cent only of the net earnings of the road are to be paid to the United States to be applied upon the subsidy bonds. By the act of 1878, twenty-five per cent of the net earnings are to be thus paid and applied. By the contract, the only security which the government had for its subsidy bonds was a second mortgage on the road and its appurtenances and telegraph line; and the company was allowed to give a first mortgage as security for its own bonds, issued for an equal amount. By the act of 1878, additional security is required for the ultimate payment of its own bonds, and the subsidy bonds of the United States, by the creation of what is termed a sinking-fund; that is, by compelling the company to deposit $1,200,000 a year in the treasury of the United States, to be held for such payment, or so much thereof as may be necessary to make the five per cent net earnings, the whole sum earned as compensation for services, and sufficient in addition to make the whole reach twenty-five per cent of the net earnings.

It is not material, in the view I take of the subject, whether the deposit of this large sum in the treasury of the creditor be termed a payment, or something else. It is the exaction from the company of money for which the original contract did not stipulate, which constitutes the objectionable feature of the act of 1878. The act thus makes a great change in the liabilities of the company. Its purpose, however, disguised, is to coerce the payment of money years in advance of the time prescribed by the contract. That such legislation is beyond the power of Congress I cannot entertain a doubt. The clauses of the original acts reserving a right to Congress to alter or amend them do not, in my judgment, justify the legislation. The power reserved under these clauses is declared to be for a specific purpose. The language in the act of 1862 is as follows: "And the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same

for postal, military, and other purposes, Congress may at any time — having due regard for the rights of said companies named herein — add to, alter, amend, or repeal this act" Sect. 18. The language of the amendatory act of 1864 is more general: "That Congress may at any time alter, amend, or repeal this act." The two acts are to be read together; they deal with the same subject; and are to be treated as if passed at the same time. *Prescott* v. *Railroad Company*, 16 Wall. 603. The limitations, therefore, imposed upon the exercise of the power of alteration and amendment in the act of 1862 must be held to apply to the power reserved in the act of 1864. They are not repealed, either expressly or impliedly, by any thing in the latter act. If this be so, the legislation of 1878 can find no support in the clauses. The conditions upon which the reserved power could be exercised under them did not then exist. The road and telegraph had years before been constructed, and always kept in working order; and the government has at all times been secured in their use and benefits for postal, military, and other purposes.

But if the reserved power of alteration and amendment be considered as freed from the limitations designated, it cannot be exerted to affect the contract so far as it has been executed, or the rights vested under it. When the road was completed in the manner prescribed and accepted, the company became entitled as of right to the land and subsidy bonds stipulated. The title to the land was perfect on the issue of the patents; the title to the bonds vested on their delivery. Any alteration of the acts under the reservation clauses, or their repeal, could not revoke the title to the land or recall the bonds or change the right of the company to either. So far as these are concerned the contract was, long before the act of 1878, an executed and closed transaction, and they were as much beyond the reach of the government as any other property vested in private proprietorship. The right to hold the subsidy bonds for the period at which they are to run without paying or advancing money on them before their maturity, except as originally provided, or furnishing other security than that originally stipulated, was, on their delivery, as perfect as the right to hold the title to the land patented unincumbered by

future liens of the government. Any alteration or amendment could only operate for the future and affect subsequent acts of the company: it could have no operation upon that which had already been done and vested.

There have been much discussion and great difference of opinion on many points as to the meaning and effect of a similar reservation in statutes of the States, but on the point that it does not authorize any interference with vested rights all the authorities concur. Such was the language of Chief Justice Shaw in the case cited from the Supreme Court of Massachusetts; and such is the language of Mr. Justice Clifford in the cases cited from this court. And such must be the case, or there would be no safety in dealing with the government where such a clause is inserted in its legislation. It could undo at pleasure every thing done under its authority, and despoil of their property those who had trusted to its faith. *Commonwealth* v. *Essex Company*, 13 Gray (Mass.), 239; *Miller* v. *The State*, 15 Wall. 478; *Holyoke Company* v. *Lyman*, id. 500. See also *Shields* v. *Ohio*, 95 U. S. 319, and *Sage* v. *Dillard*, 15 B. Mon. (Ky.) 349.

The object of a reservation of this kind in acts of incorporation is to insure to the government control over corporate franchises, rights, and privileges which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation created by it may make. Such is the purport of our language in *Tomlinson* v. *Jessup*, where we state the object of the reservation to be "to prevent a grant of *corporate* rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference," and that "the reservation affects the entire relation between the State and corporation, and places under legislative control all rights, privileges, and immunities *derived by its charter directly from the State.*" 15 Wall. 454. The same thing we repeated, with greater distinctness, in *Railroad Company* v. *Maine*, where we said that by the reservation the State retained the power to alter the act incorporating the company, in all particulars *constituting the grant to it of corporate rights, privileges, and immunities;* and that "the existence of the corporation,

and its franchises and immunities, derived directly from the State, were thus kept under its control." But we added, that "rights and interests acquired by the company, *not constituting a part of the contract of incorporation*, stand upon a different footing." 96 U. S. 499.

Now, there was no grant by the United States to the Central Pacific Company of corporate rights, privileges, and immunities. No attribute of sovereignty was exercised by them in its creation. It took its life, and all its attributes and capacities, from the State. Whatever powers, rights, and privileges it acquired from the United States it took under its contract with them, and not otherwise. The relation between the parties being that of contractors, the rights and obligations of both, as already stated, are to be measured by the terms and conditions of the contract. And when the government of the United States entered into that contract, it laid aside its sovereignty and put itself on terms of equality with its contractor. It was then but a civil corporation, as incapable as the Central Pacific of releasing itself from its obligations, or of finally determining their extent and character. It could not, as justly observed by one of the counsel who argued this case, "*release itself and hold the other party* to the contract. It could not change its *obligations* and hold its *rights* unchanged. It cannot bind itself as a *civil corporation*, and loose itself by its sovereign legislative power." This principle is aptly expressed by the great conservative statesman, Alexander Hamilton, in his report to Congress on the public credit, in 1795: "When a government," he observes, "enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered out of its *power to legislate*, unless in aid of them. It is, in theory, impossible to reconcile the two ideas of a *promise which obliges* with a power *to make a law which can vary the effect of it*." Hamilton's Works, vol. iii. pp. 518, 519.

When, therefore, the government of the United States entered into the contract with the Central Pacific, it could no more than a private corporation or a private individual finally

construe and determine the extent of the company's rights and liabilities. If it had cause of complaint against the company, it could not undertake itself, by legislative decree, to redress the grievance, but was compelled to seek redress as all other civil corporations are compelled, through the judicial tribunals. If the company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power, — and all such power, with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country.

In the case of *The Commonwealth* v. *The Proprietors of New Bedford Bridge*, a corporation of Massachusetts, the Supreme Court of that State, speaking with reference to a contract between the parties, uses this language: "Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Commonwealth has no more authority to construe the charter than the corporation. By becoming a party to a contract with its citizens the government divests itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the *judicial* department of the government. The legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers which would be contrary to the elementary principles of our government, as set forth in the Declaration of Rights." 2 Gray, 850.

In that case the charter of the corporation authorized the

building of a toll-bridge across a navigable river, with two suitable draws at least thirty feet wide. A subsequent act required draws to be made of a greater width; but the court held that the question whether the draws already made were suitable, and constructed so as not unreasonably or unnecessarily to obstruct or impede public navigation, was not a question to be determined by the legislature, or by the corporation, but by the courts. It was a question which could not be authoritatively determined by either party so as to control and bind the other. "Like all other matters involving a controversy concerning public duty and private rights," said the court, "it is to be adjusted and settled in the regular tribunals, where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." In the case at bar, the government, by the act of 1878, undertakes to decide authoritatively what the obligations of the Central Pacific are, and in effect declares that if the directors of the company do not respect its construction, and obey its mandates, founded upon such construction, they shall be subject to fine and imprisonment.

The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the legislature. 3 Scam. 238. So also

an act of the legislature of Tennessee authorizing a guardian of infant heirs to sell certain lands of which their ancestor died seised, and directing the proceeds to be applied to the payment of the ancestor's debts, was, on similar grounds, held to be unconstitutional. *Jones* v. *Perry*, 10 Yerg. (Tenn.) 59. Tested by the principle thus illustrated, the act of 1878 must be held in many ways to transcend the legislative power of Congress.

I cannot assent to the doctrine which would ascribe to the Federal government a sovereign right to treat as it may choose corporations with which it deals, and would exempt it from that great law of morality which should bind all governments, as it binds all individuals, to do justice and keep faith. Because it was deemed important, on the adoption of the Constitution, in the light of what was known as tender laws, appraisement laws, stay laws, and instalment laws of the States, which Story says had prostrated all private credit and all private morals, to insert a clause prohibiting the States from passing any law impairing the obligation of contracts, and no clause prohibiting the Federal government from like legislation is found, it is argued that no such prohibition exists.

"It is true," as I had occasion to observe in another case, "there is no provision in the Constitution forbidding in express terms such legislation. And it is also true that there are express powers delegated to Congress, the execution of which necessarily operates to impair the obligation of contracts. It was the object of the framers of that instrument to create a national government, competent to represent the entire country in its relations with foreign nations, and to accomplish by its legislation measures of common interest to all the people, which the several States in their independent capacities were incapable of effecting, or if capable, the execution of which would be attended with great difficulty and embarrassment. They therefore clothed Congress with all the powers essential to the successful accomplishment of these ends, and carefully withheld the grant of all other powers. Some of the powers granted, from their very nature, interfere in their execution with contracts of parties. Thus war suspends intercourse and commerce between citizens or subjects of belligerent nations; it renders

during its continuance the performance of contracts previously made, unlawful. These incidental consequences were contemplated in the grant of the war power. So the regulation of commerce and the imposition of duties may so affect the prices of articles imported or manufactured as to essentially alter the value of previous contracts respecting them; but this incidental consequence was seen in the grant of the power over commerce and duties. There can be no valid objection to laws passed in execution of express powers, that consequences like these follow incidentally from their execution. But it is otherwise when such consequences do not follow incidentally, but are directly enacted."

"The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property." 12 Wall. 663. From this express grant in the case of bankrupts the inference is deducible, that there was no general power to interfere with contracts. If such general power existed, there could have been no occasion for the delegation of an express power in the case of bankrupts. The argument for the general power from the absence of a special prohibition proceeds upon a misconception of the nature of the Federal government as one of limited powers. It can exercise only such powers as are specifically granted or are necessarily implied. All other powers, not prohibited to the States, are reserved to them or to the people. As I said in the case referred to, the doctrine that where a power is not expressly forbidden it may be exercised, would change the whole character of our government. According to the great commentators on the Constitution, and the opinions of the great jurists, who have studied and interpreted its meaning, the true doctrine is, that where a power is not in terms granted, and is not necessary or proper for the exercise of a power thus granted, it does not exist. It would not be pretended, for example, had there been no amendments to the Constitution as originally adopted, that Congress could have passed a law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the people

to assemble and petition for a redress of grievances. The amendments prohibiting the exercise of any such power were adopted in the language of the preamble accompanying them, when presented to the States, "in order to prevent misconception or abuse" of the powers of the Constitution.

Independent of these views, there are many considerations which lead to the conclusion that the power to impair contracts, by direct action to that end, does not exist with the general government. In the first place, one of the objects of the Constitution, expressed in its preamble, was the establishment of justice, and what that meant in its relations to contracts is not left, as was justly said by the late Chief Justice, in *Hepburn* v. *Griswold*, to inference or conjecture. As he observes, at the time the Constitution was undergoing discussion in the convention, the Congress of the Confederation was engaged in framing the ordinance for the government of the Northwestern Territory, in which certain articles of compact were established between the people of the original States and the people of the Territory, for the purpose, as expressed in the instrument, of extending the fundamental principles of civil and religious liberty, upon which the States, their laws and constitutions, were erected. By that ordinance it was declared, that, in the just preservation of rights and property, "no law ought ever to be made, or have force in the said Territory, that shall, in any manner, interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed." The same provision, adds the Chief Justice, found more condensed expression in the prohibition upon the States against impairing the obligation of contracts, which has ever been recognized as an efficient safeguard against injustice; and though the prohibition is not applied in terms to the government of the United States, he expressed the opinion, speaking for himself and the majority of the court at the time, that it was clear "that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency." 8 Wall. 623.

Similar views are found expressed in the opinions of other judges of this court. In *Calder* v. *Bull*, which was here in 1798, Mr. Justice Chase said, that there were acts which the Federal and State legislatures could not do without exceeding their authority, and among them he mentioned a law which punished a citizen for an innocent act; a law that destroyed or impaired the lawful private contracts of citizens; a law that made a man judge in his own case; and a law that took the property from A. and gave it to B. "It is against all reason and justice," he added, "for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that a Federal or State legislature possesses such powers if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in all free republican governments." 3 Dall. 388.

In *Ogden* v. *Saunders*, which was before this court in 1827, Mr. Justice Thompson, referring to the clauses of the Constitution prohibiting the State from passing a bill of attainder, an *ex post facto* law, or a law impairing the obligation of contracts, said: "Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No State court would, I presume, sanction and enforce an *ex post facto* law, if no such prohibition was contained in the Constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded."

In the Federalist, Mr. Madison declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact and to every principle of sound legislation; and in the *Dartmouth College Case* Mr. Webster contended that acts, which were there held to impair the obligation of contracts, were not the exercise of a power properly legislative,

as their object and effect was to take away vested rights. "To justify the taking away of vested rights," he said, "there must be a forfeiture, to adjudge upon and declare which is the proper province of the judiciary." Surely the Constitution would have failed to establish justice had it allowed the exercise of such a dangerous power to the Congress of the United States.

In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law; and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated.

In the case at bar the contract with the Central Pacific is, as I have said, changed in essential particulars. The company is compelled to accept it in its changed form, and by legislative decree, without the intervention of the courts, that is, without due process of law, to pay out of its earnings each year to its contractors, the United States, or deposit with them, a sum that may amount to $1,200,000, and this, twenty years before the debt to which it is to be applied becomes due and payable by the company. If this taking of the earnings of the company and keeping them from its use during these twenty years to come is not depriving the company of its property, it would be difficult to give any meaning to the provision of the Constitution. It will only be necessary hereafter to give to the seizure of another's property or earnings a new name, — to call it the creation of a sinking-fund, or the providing against the possible wastefulness or improvidence of the owner, — to get rid of the constitutional restraint. To my mind the evasion of that clause, the frittering away of all sense and meaning to it, are insuperable objections to the legislation of Congress. Where contracts are impaired, or when operating against the govern

ment are sought to be evaded and avoided by legislation, a blow is given to the security of all property. If the government will not keep its faith, little better can be expected from the citizen. If contracts are not observed, no property will in the end be respected; and all history shows that rights of persons are unsafe where property is insecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled. "The moment," said the elder Adams, "the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

I am aware of the opinion which prevails generally that the Pacific railroad corporations have, by their accumulation of wealth, and the numbers in their employ, become so powerful as to be disturbing and dangerous influences in the legislation of the country; and that they should, therefore, be brought by stringent measures into subjection to the State. This may be true; I do not say that it is not; but if it is, it furnishes no justification for the repudiation or evasion of the contracts made with them by the government. The law that protects the wealth of the most powerful, protects also the earnings of the most humble; and the law which would confiscate the property of the one would in the end take the earnings of the other.

There are many other objections to the act of Congress besides those I have mentioned, each to my mind convincing; but why add to what has already been said? If the reasons given will not convince, neither would any others which could be presented. I will, therefore, refer only to the interference of the law with the rights of the State of California.

The Central Pacific being a State corporation, the law creating it is, by the Constitution of California, subject to alteration, amendment, and repeal by its legislature at any time, — a power which the legislature can neither abdicate nor transfer. In its assent given to the company to extend its road into the territory of the United States, — the general government having authorized the extension, — the legislature reserved the same control which it possesses over other railroad and telegraph companies

created by it. That control under the new constitution goes, as is claimed, to the extent of regulating the fares and freights of the company, thus limiting its income or earnings; and of supervising all its business, even to the keeping of its accounts, making disobedience of its directors to the regulations established for its management punishable by fine and imprisonment; and the legislature may impose the additional penalty of a forfeiture of the franchises and privileges of the company. The law in existence when the corporation was created, and still in force, requires the creation of a sinking-fund by the company to meet its bonds, and under it large sums have been accumulated for that purpose, and still further sums must be raised. In a word, the law of the State undertakes to control and manage the corporation, in all particulars required for the service, convenience, and protection of the public; and can there be a doubt in the mind of any one that over its own creations the State has, within its own territory, as against the United States, the superior authority? Yet the power asserted by the general government in the passage of the act of 1878 would justify legislation affecting all the affairs of the company, both in the State and in the Territories of the United States. It could treble the amount of the sum to be annually deposited in the sinking-fund; it could command the immediate deposit of the entire amount of the ultimate indebtedness; it could change the order of the liens held by the government and the first-mortgage bondholders; it could extend the lien of the government beyond the property to the entire income of the company, and, in fact, does so by the act in question (sect. 9); it could require the transportation for the government to be made without compensation; and it could subject the company to burdens which, if anticipated at the time, would have prevented the construction of the road. A power thus vast, once admitted to exist, might be exerted to control the entire affairs of the company, in direct conflict with the legislation of the State; its exercise would be a mere matter of legislative discretion in Congress. Yet it is clear that both governments cannot control and manage the company in the same territory, subjecting its directors to fine and imprisonment for disobeying their regulations. Under the Constitution the management of local

affairs is left chiefly to the States, and it never entered into the conception of its framers that under it the creations of the States could be taken from their control. Certain it is that over no subject is it more important for their interests that they should retain the management and direction than over corporations brought into existence by them. The decision of the majority goes a great way — further, it appears to me, than any heretofore made by the court — to weaken the authority of the States, in this respect, as against the will of Congress. According to my understanding of its scope and reach, the United States have only to make a contract with a State corporation, and a loan to it, to oust the jurisdiction of the State, and place the corporation under their direction. It would seem plain that if legislation, taking institutions of the State from its control, can be sustained by this court, the government will drift from the limited and well-guarded system established by our fathers into a centralized and consolidated government.

INDEX.

ABANDONED AND CAPTURED PROPERTY. See *Jurisdiction*, 9.

The act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 id. 375), authorizes the recovery in the Court of Claims of the proceeds of property captured and, without judicial condemnation, sold by the military authorities after July 17, 1862, and before March 12, 1863, if such proceeds were accounted for and credited by the Secretary of the Treasury to the abandoned and captured property fund. *United States* v. *Pugh*, 265.

ABANDONED AND CAPTURED PROPERTY ACT.

The Abandoned and Captured Property Act of March 12, 1863 (12 Stat. 820), did not repeal the act approved July 17, 1862 (id. 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." *United States* v. *Winchester*, 372.

ABATEMENT. See *Husband and Wife, Property held in Community by.*

ACCOMPLICE.

1. The district attorney has no authority to contract that a person accused of an offence against the United States shall not be prosecuted, or his property subjected to condemnation therefor, if, when examined as a witness for the government against his accomplices, he discloses fully and fairly his and their guilt. *Whiskey Cases*, 594.

2. A person so accused cannot set up such a contract in bar of proceedings against him or his property for that offence, or avail himself of it on the trial, but has merely an equitable title to Executive mercy, which the court can only notice when an application to postpone the case is made in order to give him an opportunity to apply to the pardoning power. *Id.*

ACQUIESCENCE. See *Equity*, 1.

ACTION AT LAW. See *Stockholder, Personal Liability of*, 1.

ADJOINING PROPRIETORS. See *Municipal Corporations*, 3, 4.

The owner who makes excavations on his land is liable, if he thereby deprives that of adjoining proprietors of its lateral support, while it is in its natural condition; but their right to such support does not protect whatever they have placed upon the soil increasing the downward and lateral pressure. *Transportation Company* v. *Chicago*, 635.

ADMIRALTY. See *Jurisdiction*, 9.

1. A bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty, is in the subsequent proceedings a substitute for the property; and the question whether a case is made for the recall of the property must be determined before a final decree on the bond is rendered in the District Court, or in the Circuit Court on appeal. Action on that question cannot be reviewed here. *United States* v. *Ames*, 35.
2. A decree rendered on such a bond given with sureties by the claimant at the request and for the benefit of his firm, to which the property so delivered to him belonged, bars a suit against the other partners. *Id.*
3. The fact that the adverse party had no knowledge touching the ownership of the property, and that, by reason of the insolvency of the defendants, payment of the decree cannot be enforced, affords, in the absence of fraud, misrepresentation, or mistake, no ground for relief in equity. *Id.*

ADVERTISEMENT. See *Publication, Notice by; Jurisdiction*, 6.

AFFIDAVIT.

An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties. *Campbell* v. *Rankin*, 261.

APPEAL. See *Court of Claims*, 2; *Jurisdiction*, 3, 16; *Practice*, 7–10; *Town-Site Act*, 4.

Unless allowed in open court during the term at which the decree was rendered, an appeal will be dismissed, if no citation has been issued and the appellee does not appear. *Vansant* v. *Gas-Light Company*, 213.

APPEARANCE. See *Counsel, Appearance by.*

ASSIGNEE IN BANKRUPTCY.

1. A., a British subject resident in this country, was duly declared a bankrupt by the proper district court, Dec. 10, 1868, and the conveyance of his estate was in the usual form made by the register to an assignee. At that time he had a claim against the United States, of which the commission organized under the treaty between the United States and Great Britain of May 8, 1871 (17 Stat. 863), took

ASSIGNEE IN BANKRUPTCY (*continued*).
cognizance, and made an award for its payment. *Held*, that the claim passed to the assignee. *Phelps* v. *McDonald*, 298.
2. The statutory requirement, that all suits by or against an assignee in bankruptcy shall be brought within two years from the time the cause of action accrued, relates to suits by or against him with respect to parties other than the bankrupt. *Id.*

ASSIGNMENT. See *Equity*, 2.

ATTORNEY-AT-LAW. See *Partnership, Dissolution of.*

AUTHOR. See *Copyright.*

BANK, TAXATION OF CAPITAL OF. See *Constitutional Law*, 1.

BANKRUPTCY. See *Assignee in Bankruptcy.*
1. If goods sold by a debtor with intent to defraud his creditors are attached as his property in a chancery suit to recover a debt and set aside the sale, which is brought against him and the purchaser, and the latter, with sureties, executes to the complainants a replevin bond, authorized by statute, and conditioned that he, claiming the goods as his property, will pay the ascertained value of them as expressed in the bond, should he be cast in the suit, and they be decreed to be subject to the attachment, and liable thereunder to the satisfaction of the debt sued for, his liability on the bond is not a debt created by fraud within sect. 5117 of the Revised Statutes, which provides that such a debt shall not be barred by a discharge in bankruptcy; but if the petition in bankruptcy was filed after the execution of the bond, and before the rendition of the decree determining the right of property in the goods, his liability is a contingent one, which, under sect. 5068 of the Revised Statutes, is provable against his estate in the proper bankrupt court. *Wolf* v. *Stix*, 1.
2. His discharge in bankruptcy releases him from further liability, but does not affect that of his sureties on the bond. *Id.*

BARGE. See *Passengers, Transportation of.*

BOND. See *Admiralty; Bankruptcy; Florida, Internal Improvement Fund of; Internal Revenue*, 1, 5; *Internal Revenue, Collector of*, 3, 5; *Municipal Bonds; Negotiable Securities.*

BONDHOLDERS. See *Mortgage.*

BONDS ISSUED BY THE UNITED STATES TO RAILROAD COMPANIES. See *Railroads, Net Earnings of*, 5, 7; *Union Pacific Railroad Company*, 2–4.

BREWER. See *Internal Revenue*, 2, 3.

BURDEN OF PROOF. See *Constitutional Law*, 1; *Contracts*, 9.

CALIFORNIA. See *Limitations, Statute of*, 1.

CANAL-BOAT. See *Passengers, Transportation of.*

CAÑON CITY AND SAN JUAN RAILWAY COMPANY. See *Right of Way by Railroad Company, Priority of.*

CAPTURED AND ABANDONED PROPERTY. See *Abandoned and Captured Property.*

CAUSES, DOCKETING OF. See *Practice*, 9, 10.

CAUSES, REMOVAL OF.

1. A. having recovered a judgment against B. and C. in the District Court for the parish of New Orleans, B., on the ground among others that the judgment, having been obtained by default and without lawful service upon him, was void, filed a petition in that court praying for a decree of nullity and for an injunction. An injunction and citation were issued and served upon A., who thereupon, alleging that he was a citizen of Missouri and B. a citizen of Louisiana, prayed that the action of nullity be removed to the Circuit Court of the United States. It having been so removed, and B.'s petition amended by converting it into a bill so as to conform to the practice in equity, that court, on a final hearing upon the pleadings and proofs, the latter including an exemplification of the record and proceedings in the original suit, dissolved the injunction and dismissed the bill. *Held*, that the causes relied on for the nullity of the judgment being, under the Code of Louisiana, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the Circuit Court could not take cognizance thereof. *Barrow* v. *Hunton*, 80.

2. The character of cases sought to be removed to the courts of the United States is always open to examination, to determine whether, *ratione materiæ*, they are competent to take jurisdiction thereof. State rules on the subject cannot deprive them of it. *Id.*

3. A. having in the State court recovered a judgment for $12,000 against a railroad company, the latter took the case to the Supreme Court of Iowa, where a judgment was rendered reversing that below and ordering a new trial. Immediately thereafter the company obtained and filed in the office of the clerk of the lower court, the court not being in session, a writ of *procedendo*, together with a petition under the act of March 3, 1875 (18 Stat. 470), accompanied by the necessary bond, for the removal of the case into the Circuit Court of the United States. Within the sixty days allowed for that purpose by the laws of Iowa, but after the *procedendo* and petition had been filed, A. presented an application for a rehearing, and obtained from the Supreme Court an order suspending its judgment until the next term. The company then appeared and moved to dismiss the application, on the ground that, before it was presented, the case had been removed into said Circuit Court, and that, consequently, the Supreme Court had no jurisdiction thereof. That motion being denied and a rehearing had, A. consented to a reduction of the amount of his recovery to $7,000, whereupon judgment therefor was

CAUSES, REMOVAL OF (*continued*).

entered in the Supreme Court in accordance with its opinion. *Held*, 1. That the Supreme Court having, after reversing the judgment of the lower court, still retained jurisdiction of the cause for the purpose of a rehearing, the right of the defendant to a new trial had not been perfected when the petition for removal was filed. 2. That the subsequent judgment in the Supreme Court operated as a revocation of the order to the court below to grant a new trial, and consequently withdrew the case from under that petition. *Sed quære*, Is the filing of the petition and bond in the clerk's office, the court not being in session, sufficient, under any circumstances, to effect a removal? *Railroad Company* v. *McKinley*, 147.

4. The ruling in *Vannevar* v. *Bryant* (21 Wall. 41), that after one trial has been had in a State court, the right to another must be perfected before a demand can be made for the removal of the case to the Circuit Court of the United States, reaffirmed. *Id.*

5. A., a citizen of Florida, with other persons, some of whom were citizens of New York, was sued by a citizen of the latter State, in a court thereof. The plaintiff, in his petition, alleged that the defendants held all the franchises and property of a certain railroad company, and prayed that they be required to hold the income of the railroad in trust for the payment of a judgment theretofore rendered in his favor in that court against the company, and that they be directed to pay him the amount thereof, and for other relief. He averred that A. was indorser on part of the notes on which the judgment had been rendered. There was a judgment in favor of all the defendants, which the Court of Appeals affirmed, except as to A. The cause was remanded for a new trial as to him, solely on account of his alleged liability as such indorser. After the *remittitur* went down to the court of original jurisdiction, and before such new trial, A. filed his petition in due form, accompanied by the necessary bond, for the removal of the suit as against him to the proper Circuit Court of the United States, under the act of July 27, 1866, 14 Stat. 306. *Held*, that the matter in dispute being sufficient, A. was entitled to a removal of the suit. *Yulee* v. *Yose*, 539.

CENTRAL PACIFIC RAILROAD COMPANY. See *Constitutional Law*, 3–6; *Railroads, Net Earnings of*, 3, 4.

CHALLENGE, RIGHT OF. See *Juror*, 1.

CHARTER. See *Constitutional Law*, 2–6; *Taxation, Exemption from.*

CITATION. See *Appeal; Practice*, 18.

CITY, LANDS HELD BY, FOR PUBLIC PURPOSES. See *Lands held by a City for Public Purposes.*

CIVIL SURGEONS.

Civil surgeons appointed by the Commissioner of Pensions under sect. 4777 of the Revised Statutes are not officers of the United States. *United States* v. *Germaine*, 508.

CLAIMS AGAINST THE UNITED STATES. See *Assignee in Bankruptcy.*

COASTING VESSELS.

Steamboats which ply between different ports on a navigable river may, under a State statute, be taxed as personal property by the city where the company owning them has its principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon, demandable under those laws, have been duly paid. *Transportation Company* v. *Wheeling*, 273.

COLLATERAL SECURITY. See *Mortgage, Equitable; Municipal Bonds*, 9; *National Bank.*

COMMERCE. See *Coasting Vessels.*

COMMISSIONER OF INTERNAL REVENUE. See *Internal Revenue*, 4.

COMMISSIONER OF PENSIONS. See *Civil Surgeons.*

The Commissioner of Pensions is not the head of a department, within the meaning of sect. 2, art. 2, of the Constitution, prescribing by whom officers of the United States shall be appointed. *United States* v. *Germaine*, 508.

COMPTROLLER OF THE CURRENCY. See *Stockholder, Personal Liability of*, 2.

CONCURRENT JURISDICTION. See *Equity*, 1.

CONDITION.

A., a married woman, offered to pay one-half of her indebtedness in land in B. County, Mississippi, at ten dollars per acre, and give her notes secured by mortgage on her land in C. County, in that State, for the remainder. A large number of her creditors having accepted the offer, she conveyed her land to D. in trust, but provided in the deed that if any of them should fail within ninety days from its date "to signify in writing their acceptance of the terms of settlement and payment of their claims or debts," they should "be considered as refusing the same," and be debarred from the benefits of the deed. Among the creditors accepting the offer was E., who surrendered the notes held by him and took the new ones. After the ninety days had expired, A. expressed her hope that all her creditors would come in, and authorized her agent, in case they did, to receive her old notes and deliver the new ones in exchange therefor. At the time of said offer, A. represented that the land was incumbered only by a small annuity, and concealed the fact that a judgment by default had been obtained in C. County by F. against her and her husband. On execution sued out on that judgment, G., her son, and said F. purchased her land in that county. E. thereupon filed his bill to set the judgment aside, or to obtain

CONDITION (*continued*).

leave to redeem the land. *Held*, 1. That E. having acted in pursuance of the original offer of A., the condition in her deed as to a written acceptance within ninety days did not apply to him. 2. That the condition being only in the nature of a penalty against the creditors, not assenting in the prescribed way, could be, and in fact was, waived by A. *Bank* v. *Partee*, 325.

CONFEDERATE NOTES. See *Trust*.

CONFISCATION ACT. See *Abandoned and Captured Property Act; Judicial Sale*, 1.

CONSTITUTIONAL LAW. See *Coasting Vessels; Commissioner of Pensions; Municipal Corporations*, 5.

1. In assessing the taxes for the city of New Orleans for the year 1876, a bank there located, with a nominal capital of $1,000,000, was assessed, in addition to its real estate, for the sum of $700,000, as its capital, or money at interest. It refused to pay the assessment, alleging that its capital, not invested in real estate, consisted of legal-tender notes of the United States. *Held*, that the bank, on whom was the burden of proof, having failed by its own statement (*supra*, p. 98), or otherwise, to make good its allegation, the assessment does not invade its rights under the Constitution or the laws of the United States. *Canal and Banking Company* v. *New Orleans*, 97.
2. The statute of Illinois passed in 1872 conforming taxation to the new Constitution of 1870, and limiting the exemption of the property of the Northwestern University to land and other property in immediate use by the institution, impairs the obligation of the contract contained in the statute of 1855, which declares that all the property of that University shall be for ever free from taxation. *University* v. *People*, 309.
3. So far as it establishes in the treasury of the United States a sinking-fund, the act of Congress approved May 7, 1878 (20 Stat. 56), entitled "An Act to alter and amend the act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and also to alter and amend the act of Congress approved July 2, 1864, in amendment of said first-named act," is not unconstitutional. *Sinking-Fund Cases*, 700.
4. The right of amendment, alteration, or repeal reserved by Congress in said acts of 1862 and 1864 considered. *Id.*
5. The establishment of the fund is a reasonable regulation of the administration of the affairs of the companies, promotive alike of the interests of the public and of the corporators, and is warranted under the authority which Congress has, by way of amendment, to

CONSTITUTIONAL LAW (*continued*).
change or modify the rights, privileges, and immunities granted by it. *Id.*

6. The legislation of Congress in relation to the Central Pacific Railroad Company and the Western Pacific Railroad Company — the latter now by consolidation a part of the former — considered, and *held*, 1. That, to the extent of the powers, rights, privileges, and immunities thereby granted, Congress retains the right of amendment, and by exercising it may, in a manner not inconsistent with the original charter granted by California, as modified by the act of that State passed in 1864, accepting what had been done by Congress, regulate the administration of the affairs of the company in reference to the debts created by it under authority of such legislation. 2. That the establishment of the sinking-fund by the act of May 7, 1878 (*supra*), does not conflict with any thing in said charter. *Id.*

CONTINUANCE, AFFIDAVIT FOR. See *Record*.

CONTRACTS. See *Accomplice*, 1; *Constitutional Law*, 2; *Jurisdiction*, 5; *Lands, Contract for the Sale of; Specific Performance*.

1. A contract between the United States and A., for his removal of the rock at the entrance of a certain harbor, provided that he should complete the work at a specified time, and that if he should delay or be unable to proceed with it in accordance with the contract, the officer in charge might terminate the contract, and employ others to complete the work, deducting expenses from any money due or owing to A., who was also to be responsible for any damages caused to others by his delay or non-compliance. Payment upon the completion and acceptance of the several sections was to be made, reserving ten per cent therefrom until the completion and acceptance of the whole work. The work was not completed at the specified time, chiefly in consequence of the failure of a third party to deliver to A. the necessary explosive, and the officer in charge terminated the contract; but the evidence does not show that his action was wrongful. The work was completed by other parties at much lower terms. A. brought suit against the United States. *Held*, that the United States having sustained no loss by the failure of A., he is entitled to the reserved ten per cent, but not to the profits that he would have made had he performed the contract, nor to the difference between the contract price and that at which the work was completed by others. *Quinn* v. *United States*, 30.

2. The Secretary of the Treasury having been authorized by sect. 15 of the act of March 2, 1867 (14 Stat. 481), to "adopt, procure, and prescribe" meters to be used by distillers, adopted the meter of A., April 18, 1867. If the Secretary revoked his order, it was agreed that A. should be paid for all the instruments he might then have completed or have in process of completion, provided the number of

CONTRACTS (*continued*).

sets in process of manufacture at any one time should not exceed twenty. A joint resolution, passed Feb. 3, 1868 (15 id. 246), declared that, pending an examination thereby directed, all work on the construction of meters under the direction of the Treasury Department should be suspended, and that in the mean time no further contract should be made under the act of March 2, 1867. Power to adopt and prescribe meters was, by the act of July 20, 1868 (id. 125), conferred upon the Commissioner of Internal Revenue, who, Sept. 16, 1868, adopted A.'s meter, reserving the right to entirely revoke his order adopting it, and, on the part of the government, direct the discontinuance of its manufacture. June 8, 1870, the commissioner revoked his previous order, except as to meters then on hand or in process of construction not exceeding twenty sets; and A. was informed that neither the government nor any department or officer thereof was or would be responsible for or on account of any meters. The use of A.'s meter was entirely discontinued June 8, 1871. He then had fourteen and a half sets on hand, for the value of which he brought this suit, contending that the contract made by the Secretary in 1867, to pay for the instruments on hand at the time of the discontinuance to the extent of twenty sets, was adopted by the commissioner in 1868, and was made part of all the subsequent proceedings. It does not appear that any of the fourteen and a half sets on hand June 8, 1871, were on hand or in process of manufacture June 8, 1870. *Held*, that A. was not entitled to recover. *Tice* v. *United States*, 286.

3. A contract entered into between A. and B., whereby the former, for a valuable consideration, bound himself to secure, upon the location of certain certificates authorized to be issued by the act of July 17, 1854 (10 Stat. 304), title to the land thereby located to be vested in B., is not in violation of that act, or of the treaty of Prairie du Chien proclaimed Feb. 24, 1831 (7 id. 330). *Myrick* v. *Thompson*, 291.

4. Unless the contract so provides, the demand of one of the parties thereto that the other shall perform his agreement need not be in writing. *Colby* v. *Reed*, 560.

5. Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount. *Id.*

6. In such an action the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, the property for the non-delivery of which the action was brought. *Id.*

7. The notice of the rescission of a contract is not rendered void by reason of the fact that it was given in Nevada on Sunday. *Pence* v. *Langdon*, 578.

CONTRACTS (*continued*).

8. The vendee of stock in a company, who, on the ground of fraud, rescinded his contract of purchase, is not bound to receive the stock certificate left on deposit for him by the vendor, and tender it to the latter before bringing his action for the purchase-money. *Id.*

9. Where the plaintiff's knowledge of the fraud and his neglect to promptly rescind the contract are relied on to defeat the action, the burden of proving the fact of such knowledge and the time when it was acquired rests upon the defendant. *Id.*

CONVEYANCE. See *Condition; Judicial Sale*, 1; *Lands, Contract for the Sale of*, 2; *Mortgage, Equitable.*

COPYRIGHT.

The right of an author or a publisher, under the copyright law, is infringed only when other persons produce a substantial copy of the whole or of a material part of the book or other thing for which he secured a copyright. Where, therefore, the owner of a copyright for maps of certain wards of "the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building, and the classes are shown by the different coloring and characters set forth in the reference," brought his bill to restrain the publication of similar maps of the city of Philadelphia. *Held*, that the bill could not be sustained. *Perris* v. *Hexamer*, 674.

CORPORATION. See *Municipal Corporations; Practice*, 7, 8; *Taxation, Exemption from.*

COUNSEL, APPEARANCE BY.

Counsel who enter their appearance under the requirements of Rule 9 will be held responsible for all that such an entry implies, until, by substitution or otherwise, they are relieved from the obligation they have assumed. *Alvord* v. *United States*, 593.

COUPONS. See *Estoppel*, 5; *Municipal Bonds*, 2, 4, 6, 7.

COURT AND JURY. See *Practice*, 13.

1. The court submitted to the jury to determine whether from certain letters and telegrams, when considered in connection with the other evidence in the case, the defendant undertook to act as the agent of the plaintiff in the purchase of stock from other parties. The jury found, and the letters clearly showed, that he did undertake so to act. *Held*, that the omission of the court to construe the written evidence, if erroneous, affords him no just cause of complaint. *Pence* v. *Langdon*, 578.

2. A. brought an action against the proprietor of a park, to recover for injuries sustained by her from an attack by a male deer which, with other deer, was permitted to roam in the park, and which the declaration charged that the defendant knew to be dangerous. At the trial, evidence was introduced to show that the park was open

COURT AND JURY (*continued*).

and accessible to visitors; that A. was in the habit of visiting it, and when lawfully there was attacked by the deer and severely injured; that she had often seen deer — about nine in number, three of whom were bucks, the oldest four years old — running about on the lawn, and persons playing with them, and that she had there seen the sign, "Beware of the buck;" that the park contained about eleven acres; that notices were put up in the park a year or two before cautioning visitors not to tease or worry the deer; that she had no knowledge or belief, prior to the attack upon her, that the deer were dangerous, if not disturbed. Experts testified that in their opinion the male deer, at the season when the injury was sustained by A., was a dangerous animal. The bill of exceptions does not show that all the evidence for A. is set forth in it, or that the defendant introduced any. *Held*, that a motion to dismiss the action, nonsuit the plaintiff, and to direct the jury to return a verdict for the defendant, was properly denied. *Spring Company* v. *Edgar*, 645.

3. The court called attention to the testimony of the experts, and instructed the jury that it was for them to determine its weight. *Held*, that the instruction was proper. *Id.*

4. The jury were also instructed not to believe any extravagant statement of the injuries received by the plaintiff, and that, when they had made up their minds as to the amount really sustained, they should not be nice in the award of compensation, but that it should be liberal. The defendant did not request the instruction to be qualified or explained, or a different one given. *Held*, that the charge in that respect furnishes no ground for reversing the judgment. *Id.*

5. Where the charge to the jury, taken as a whole, fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification. *Evanston* v. *Gunn*, 660.

6. Where, upon the undisputed facts of the case, the plaintiff is entitled to recover, it is not error for the court to instruct the jury to find for him. *Orleans* v. *Platt*, 676.

7. Where the testimony is all one way, a party is not entitled to instructions which assume that it is otherwise. *Id.*

COURT OF CLAIMS. See *Abandoned and Captured Property; Limitations, Statute of*, 3.

1. Where, in a suit arising under the act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 id. 375), no direct proof was given that the proceeds of the sale of the property were paid into the treasury, if the circumstantial facts which are established by the evidence are set forth in the finding of the Court of Claims, which it

COURT OF CLAIMS (*continued*).

sends here as that upon which alone its judgment was rendered, and they are, in the absence of any thing to the contrary, the legal equivalent of a direct finding that such proceeds were so paid, this court will not on that account reverse the judgment. *United States* v. *Pugh*, 265.

2. The judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is, if the question is properly presented, subject on appeal to be here reviewed; and where the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record. *Id.*

3. *United States* v. *Crusell* (14 Wall. 1), *Same* v. *Ross* (92 U. S. 281), and *Intermingled Cotton Cases* (id. 651), so far as they bear upon the rule requiring, on an appeal from the Court of Claims, a finding by that court of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them, cited and explained. *Id.*

CREDITORS. See *Mortgage*, 1, 3.

CRIMINAL LAW.

A statute of Utah, passed March 6, 1852, provides that a person convicted of a capital offence "shall suffer death by being shot, hanged, or beheaded," as the court may direct, or "he shall have his option as to the manner of his execution." The Penal Code of the Territory, adopted in 1876, by which all acts and parts of acts inconsistent therewith are repealed, provides that any person convicted of murder in the first degree "shall suffer death," and that "the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed." A., convicted of having, June 11, 1877, committed murder in the first degree, was, by the proper court of that Territory, sentenced to be publicly shot. *Held*, that the sentence was not erroneous. *Wilkerson* v. *Utah*, 130.

DAMAGES. See *Adjoining Proprietors; Contracts*, 1, 6; *Court and Jury*, 4; *Municipal Corporations*, 3, 6; *Nuisance; Practice*, 17.

DECEDENT ESTATES. See *Georgia, Statute of Limitations of.*

1. A testator in whom was the legal title to lands, which he had sold by a written contract, can transfer by his will both such title and the notes given for the purchase of them, and the devisee will stand towards the purchaser in the same position that the testator did. *Atwood* v. *Weems*, 183.

2. Where the President, at the close of hostilities, appointed a military

DECEDENT ESTATES (*continued*).

governor of one of the States, the people whereof had been in rebellion against the United States, — *Held*, that such appointment did not change the general laws of the State then in force for the settlement of the estates of deceased persons, nor remove from office those who were at the time charged by law with public duties in that behalf. *Ketchum* v. *Buckley*, 188.

DEED. See *Judicial Sale*, 1.

DE FACTO OFFICER. See *Town-Site Act*, 1.

DEFAULT. See *Internal Revenue*, 5, 6.

DENVER AND RIO GRANDE RAILROAD COMPANY. See *Right of Way by Railroad Company, Priority of.*

DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY.

The Denver Pacific Railway and Telegraph Company is not liable for the debt incurred by the Kansas Pacific Railway Company on account of subsidy bonds; and although it is bound to perform the government service stipulated by the Pacific Railroad acts at the rates therein prescribed, and is subject to their provisions, so far as they are applicable to it, no part of the compensation due it for such service can be retained by the United States. *United States* v. *Denver Pacific Railway Company*, 460.

DEPARTMENTS, EXECUTIVE. See *Commissioner of Pensions.*

DEPUTY COLLECTOR. See *Internal Revenue, Collector of*, 1, 2.

DEVISEE. See *Decedent Estates*, 1.

DIRECT TAXES, SALES FOR.

1. The court reaffirms the ruling in *Bennett* v. *Hunter* (9 Wall. 326) and *Tacey* v. *Irwin* (18 id. 549), that a sale for direct taxes under the act of 1862 is void, where, before the sale, the owner, or some one for him, was ready and offered to pay them, and was told that payment would not be accepted. *Atwood* v. *Weems*, 183.
2. Such offer to pay, made to a clerk of the board of commissioners at their office, who was authorized by them to receive delinquent taxes generally, is sufficient. *Id.*
3. The court reaffirms the doctrine in *De Treville* v. *Smalls* (98 U. S. 517), that the certificate given by the commissioners to the purchaser of lands at a sale for a direct tax, under the act of June 7, 1862 (12 Stat. 422), as amended by the act of Feb. 6, 1863 (id. 640), is *prima facie* evidence of the regularity of the sale and of all the antecedent facts essential to its validity and to that of his title thereunder, and that it can only be affected by establishing that the lands were not subject to the tax, or that it had been paid previously to the sale, or that they had been redeemed. *Keely* v. *Sanders*, 441.
4. The sale may be valid, although, when it and the assessment were

DIRECT TAXES, SALES FOR (*continued*).
made, the lands belonged to a non-resident and were *in custodia legis*, the State court in which the *lis* was pending having enjoined all creditors from interfering with or selling them, and they were sold as an entirety, notwithstanding the fact that the tax bore but a small proportion to their value. *Id.*
5. A description of the lands in the notice of sale, which identifies them so that the owner may have information of the claim thereon, is all that the law requires. *Id.*
6. The word "district," where it occurs in the sixth section of the said act of 1862, signifies a part or portion of a State. The city of Memphis, Tenn., was, therefore, a district within the meaning of that section. *Id.*

DISTILLED SPIRITS. See *Internal Revenue*, 1.

DISTILLER. See *Internal Revenue*, 1–4.

DISTRICT ATTORNEY. See *Accomplice*, 1; *Juror*, 3.

DIVIDENDS, TAX ON. See *Internal Revenue*, *Collector of*, 4, 5.

EJECTMENT. See *Evidence*, 1; *Limitations*, *Statute of*, 1.

EQUITABLE MORTGAGE. See *Mortgage*, *Equitable*.

EQUITY. See *Admiralty*, 3; *Jurisdiction*, 10, 11, 12; *Partnership*, *Dissolution of*, 1.
1. In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law; in many other cases they act upon the analogy of the limitations at law; but even where there is no such statute governing the case, a defence founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Godden* v. *Kimmell*, 201.
2. A., an alleged creditor of B., whose claim had not been established at law, filed his bill against the latter, averring him to be insolvent, and against C., a debtor of B., praying that the debt due from C. be applied to the payment of that claim. There being no assignment to A. by B. of his debt against C., and no lien upon the fund in the hands of the latter, — *Held*, that the bill could not be sustained. *Smith* v. *Railroad Company*, 398.

ESTOPPEL. See *Admiralty*, 2; *Husband and Wife*, *Property held in Community by*; *Municipal Bonds*, 1–4, 6, 12; *National Bank*, 2; *Union Pacific Railway Company*, 2.
1. The judgment of a court of competent jurisdiction is, as to every issue decided in the suit, conclusive upon the parties thereto, and in a subsequent suit between them parol evidence, whenever it becomes necessary in order to show what was tried in the first suit, is admissible. *Campbell* v. *Rankin*, 261.

ESTOPPEL (*continued*).

2. A court in Louisiana, having jurisdiction of the parties and the subject-matter of the suit, rendered a judgment in favor of the plaintiff for a debt, with lien and privilege on the lands described in the mortgage given by the defendant to secure it. The judgment, on a devolutive appeal by the defendant, was in all things affirmed by the Supreme Court of the State. Pending the appeal, the lands were sold by the sheriff under the judgment, and purchased by the plaintiff, who obtained a monition under the act for the further assurance of titles to purchasers at judicial sales. Due publication of said monition having been made, and there being no opposition to said sale, the proper court ordered that the same "be confirmed and homologated according to law." A suit was subsequently brought in the Circuit Court of the United States by the heir-at-law of the mortgagor, praying that the title of the purchaser at said sale be decreed to be null and void, and that the complainant be adjudged to be the true and lawful owner of the lands. *Held*, that the judgment in the proceedings on the monition is conclusive proof of the validity of the sale, and, as *res adjudicata*, is a complete bar to the suit. *Montgomery* v. *Samory*, 482.

3. Where, pursuant to the authority vested in him by chapter 907 of the laws of New York, passed May 18, 1869, and the several laws amendatory thereof, the county judge renders judgment declaring that the conditions have been performed whereon a town in the county can lawfully subscribe for shares of the capital stock of a railroad company in that State, and issue its bonds to pay therefor, — *Held*, that the judgment, until reversed by a higher court, is conclusive. *Orleans* v. *Platt*, 676.

4. His judgment in favor of the subscription cannot be collaterally attacked in a suit on the bonds brought by a *bona fide* holder for value of them against the town; and where it is recited in them, the town is estopped from denying their validity. *Lyons* v. *Munson*, 684.

5. A., the lawful holder of coupons detached from bonds issued by a county in Kansas, applied to a court of competent jurisdiction for a *mandamus* to compel the county commissioners to pay such of them as were then due, and levy a tax sufficient to pay those shortly thereafter falling due. The commissioners denied the validity of the bonds and the obligation of the county to pay them. Judgment was rendered for the defendants. Subsequently, A. delivered the same coupons to B., to be collected for the benefit of A. B. brought suit. *Held*, that the judgment was a bar to the suit. *Block* v. *Commissioners*, 686.

EVIDENCE. See *Accomplice*, 1; *Court and Jury*, 1, 7; *Court of Claims*, 1–3; *Direct Taxes, Sales for*, 3; *Practice*, 3, 4; *Record*.

1. In ejectment, or trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor, prior to his

EVIDENCE (*continued*).
eviction, is *prima facie* evidence of title, on which he can recover against a mere trespasser. *Burt* v. *Panjaud*, 180.
2. In trespass *quare clausum fregit*, actual possession of the land by the plaintiff is sufficient evidence of title to authorize a recovery against a mere trespasser. *Campbell* v. *Rankin*, 261.
3. The judgment of a court of competent jurisdiction is, as to every issue decided in the suit, conclusive upon the parties thereto, and in a subsequent suit between them parol evidence, whenever it becomes necessary in order to show what was tried in the first suit, is admissible. *Id.*
4. While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession. *Id.*
5. The fifth section of the act entitled "An Act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 Stat. 91), gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective States, and does not exclude as *prima facie* evidence of title proof of actual possession, and of its extent. *Id.*
6. The record kept by a person employed in the Signal Service of the United States, whose public duty it is to record truly the facts therein stated, is competent evidence of such facts. *Evanston v. Gunn*, 660.

EXECUTION. See *Lands held by a City for Public Purposes.*

EXPERTS, TESTIMONY OF. See *Court and Jury*, 3.

FALSE IMPRISONMENT. See *Jurisdiction*, 1.

FEDERAL QUESTION. See *Jurisdiction*, 1.

FINDINGS OF FACT. See *Court of Claims.*

FLORIDA, INTERNAL IMPROVEMENT FUND OF.
1. Where, under the act of the State of Florida entitled "An Act to provide for and encourage a liberal system of internal improvements in this State," passed Jan. 6, 1855, a railroad was sold by the trustees of the internal improvement fund, who applied the proceeds of the sale to the purchase and cancellation of a part of the outstanding bonds of the company, — *Held*, that the purchaser of the road is thereafter required to pay, on account of the sinking-fund for which that act provides, one-half of one per cent semi-annually upon the remaining bonds, and not upon the entire amount originally issued by the company. *Doggett* v. *Railroad Company*, 72.
2. Where the receiver of the internal improvement fund who was appointed by the court filed a bill in equity to determine upon what amount of said bonds the purchaser was bound to make such semi-annual payment, — *Held*, that the holders of them were not proper parties complainant. *Id.*

FORECLOSURE. See *Mortgage*, 1–4.

FORFEITURE. See *Internal Revenue*, 5, 6.

FRAUD. See *Admiralty*, 3; *Bankruptcy; Contracts*, 8, 9.

FRAUDS, STATUTE OF. See *New Hampshire. Statute of Frauds of.*

GEORGIA, STATUTE OF LIMITATIONS OF.

The statute of Georgia of March 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before Jan. 1, 1870, does not apply to claims against the estate of a deceased person, so as to exclude the time which a previous statute allowed to administrators to ascertain the condition of the estate, and to creditors to file their claims. *Mills* v. *Scott*, 25.

HUSBAND AND WIFE, PROPERTY HELD IN COMMUNITY BY.

A. gave his promissory notes, payable Jan. 1, 1868, and Jan. 1, 1869, and to secure the payment thereof executed a mortgage on certain lands in Louisiana, which he had held in community with his wife, then deceased. In proceedings upon an order of seizure and sale, the holder of the note purchased the property, and brought in a State court a petitory action therefor and for rents and profits. A. answered, setting up the nullity of the proceedings, by reason of the non-compliance by the sheriff with the requirements of the statute. B., his son, intervened, setting up such nullity. and also claiming one-half of the property as the heir of his deceased mother. A. having died, the plaintiff filed a supplemental petition against B., which contained no prayer for a personal judgment against him, nor did it set up the debt itself as a ground of claim or action. Judgment was rendered in favor of B., upon the ground that he was the owner of an undivided half of the property, and that the sale by the sheriff was void, because he had never had the property in his possession. The holder of the notes thereupon, Oct. 19, 1876, brought suit in the Circuit Court of the United States against B., charging him on the notes as universal heir of A., averring that he was liable for the debt, because as such heir he had taken possession of the estate and property of A., and praying a decree for the debt, with mortgage lien and privilege out of the mortgage property. B. set up the prescription of five years, and averred that the order of seizure and sale was a merger of the original debt, and that the executory proceedings were still pending; that he had taken possession of one half of the property as heir of his mother, and of the other half as the beneficiary heir of his father; but denied that such possession made him liable for the debt. He furthermore set up the said judgment as a bar. *Held*, 1. That the order of seizure and sale did not merge the debt, but that it was a judicial demand, continuing in operation until rendered effective by a valid sale of the property, and that the plea of prescription could not, therefore, be sustained. 2. That the pendency of a suit in a State court does not abate a suit upon the

HUSBAND AND WIFE, PROPERTY HELD IN COMMUNITY BY (*continued*).

same cause of action in a court of the United States. 3. That the said judgment is not a bar to this suit. 4. That under articles 371 and 977 of the Civil Code of Louisiana, if a husband after the death of his wife mortgages community property for his debt, and afterwards dies while their son and heir is still a minor, but after he has been emancipated, the latter does not render himself liable for the debt as universal heir of his father, by simply taking possession of the property and receiving to his own use the rents and profits thereof. 5. That the complainant is entitled to a decree for the sale of one undivided half of the mortgaged property, to pay said notes and interest. *Gordon* v. *Gilfoil*, 168.

ILLINOIS. See *Constitutional Law*, 2; *Jurisdiction*, 2; *Municipal Bonds*, 4–6; *Municipal Corporations*, 1, 6, 7.

INFRINGEMENT. See *Copyright*.

INSTRUCTIONS TO JURY. See *Practice*, 23–25.

INSURRECTIONARY STATES, PROVISIONAL GOVERNMENTS IN. See *Decedent Estates*, 2.

INTERNAL REVENUE.

1. Debt on a bond given under sect. 23 of the act of July 20, 1868 (15 Stat. 135), by a distiller with sureties, conditioned to be void if the obligors paid the taxes on the spirits deposited in the warehouse before their removal, and within one year from the date of the bond. Before the expiration of that time the spirits, while in the bonded warehouse in charge of an internal-revenue store-keeper, were destroyed by fire, without any fault, negligence, or carelessness on the part of the distiller, or of any person in charge of the distillery and warehouse who was in his employ. *Held*, that the obligors are liable to pay the taxes. *Farrell* v. *United States*, 221.

2. Brewers are included within the prohibition of the statute (14 Stat. 113; Rev. Stat., sect. 3232) that no person, firm, company, or corporation shall be engaged in or carry on any trade, business, or profession until he or they shall have paid the required special tax. *United States* v. *Glab*, 225.

3. If such tax for one year has been paid by a firm of brewers, which before the expiration of the year is dissolved by the retirement of one partner, the other may carry on the same trade or business at the same place for the remainder of the year, without again paying such tax or any part thereof. *Id.*

4. A. purchased, May 8, 1875, certain high wines from B., which the latter had produced and removed from his distillery to the bonded warehouse, the tax not having been paid on them. The collector of internal revenue was duly notified of the sale. While they were there, the Commissioner of Internal Revenue, under authority of sect. 3309 of the Revised Statutes, assessed a tax on the number of

INTERNAL REVENUE (*continued*).

proof gallons of spirits distilled by B. at that distillery between Jan. 6 and March 8, 1875. *Held*, that the wines so purchased by A. were subject to the lien of the tax, and also, in the case of its non-payment, to the interest, penalty, and charges provided by law. *Hartman* v. *Bean*, 393.

5. The court reaffirms its ruling in *Erskine* v. *Milwaukee & St. Paul Railroad Co.* (94 U. S. 619), that the forfeiture of $1,000 is the only penalty to which a corporation is liable for default, under sect. 122 of the internal-revenue act of June 30, 1864 (13 Stat. 284), as amended by the act of July 13, 1866. 14 id. 138. *Elliott* v. *Railroad Company*, 573.

6. No intention to add to the penalty for that default, while the section remained in force, is manifested by the act of July 14, 1870. 16 Stat. 260. *Id.*

INTERNAL REVENUE, COLLECTOR OF.

1. A., a collector of internal revenue, was suspended, Sept. 23, 1873, from office, upon charges of fraud, by the supervisor, who reported his action to the commissioner, in accordance with sect. 3163 of the Revised Statutes. The Secretary of the Treasury, Sept. 26, directed B., the deputy collector of the district, to assume the duties of collector, as of Sept. 23, in place of A., and to continue in office until some person should be appointed thereto and duly qualified. A. died Oct. 16. A collector, appointed Nov. 9, took the oath and gave the required bond, Dec. 1, but did not take possession of the office until Dec. 10. B. performed the duties of collector from Sept. 23 to and including Dec. 9. *Held*, that B. was entitled to the compensation of collector during the whole period. *United States* v. *Farden*, 10.

2. Under the last clause of the first section of the act of March 1, 1869 (15 Stat. 282), providing that a deputy collector of internal revenue shall not receive compensation as collector, when the latter is entitled to compensation for services rendered during the same period of time, a collector suspended for fraud, and rendering no services thereafter, is not entitled to compensation so as to exclude the deputy collector therefrom; and the better opinion is that that provision is repealed by its omission from 16 Stat. 179; Rev. Stat., sect. 3150. *Id.*

3. Where a tax long past due to the United States has been paid to the collector of internal revenue, he and his sureties are liable therefor, although the amount so paid had not then been returned to the assessor's office or passed upon by him, nor had a sworn return of the tax-payer been delivered. *King* v. *United States*, 229.

4. The ruling in *The Dollar Savings Bank* v. *United States* (19 Wall. 227), that the obligation to pay the tax on dividends or interest does not depend on an assessment by any officer, and that a suit for such tax

INTERNAL REVENUE, COLLECTOR OF (*continued*).
can be sustained without it, reaffirmed and applied to the present case. *Id.*
6. The tax so paid is public money covered by the terms of the bond. *Id.*

IOWA. See *Causes, Removal of*, 8.

JUDGMENT. See *Estoppel; Taxation*, 1, 3.

JUDICIAL CONDEMNATION. See *Abandoned and Captured Property*.

JUDICIAL NOTICE. See *Letters-patent*.

JUDICIAL SALE. See *Estoppel*, 2; *Mortgage*, 4.
1. A marshal's deed which includes, with certain lands legally sold under the confiscation act of July 17, 1862 (12 Stat. 589), a parcel not mentioned either in the information, the monition, or the decree of condemnation, under which the sale was made, passes no title to such parcel. *Burbank* v. *Semmes*, 138.
2. A sale of lands in Louisiana by the sheriff is void unless he has them in his possession. *Gordon* v. *Gilfoil*, 168.

JURISDICTION. See *Admiralty; Causes, Removal of*, 2; *Court of Claims*, 2; *Equity*, 1; *Partnership, Dissolution of*, 1; *Practice*, 16, 17; *Stockholder, Personal Liability of*, 1.

I. OF THE SUPREME COURT.
1. This court having in *Ex parte Lange* (18 Wall. 163) held that the judgment against him, rendered Nov. 8, 1873, was not authorized by law, he brought, in a State court, an action against the judge who pronounced it. That court decided that even though the judgment was unauthorized, the defendant having, in pronouncing it, acted in his judicial capacity, and it not being so entirely in excess of his jurisdiction as to make it the arbitrary and unlawful act of a private person, was not liable in damages. *Held*, that such decision does not present a Federal question. *Lange* v. *Benedict*, 68.
2. This court has jurisdiction to review the decision of the Supreme Court of Illinois, upon the question whether the statute of that State, passed in 1855, exempting all the property of the Northwestern University for ever from taxation, is a valid contract, or is void by reason of its conflicting with the State Constitution of 1848. *University* v. *People*, 309.
3. Under the act entitled "An Act concerning the practice in territorial courts, and appeals therefrom," approved April 7, 1874 (18 Stat. pt. 3, p. 27), the appellate jurisdiction of this court over the judgment or the decree rendered by a territorial court in a case not tried by a jury can only be exercised by appeal. *Stringfellow* v. *Cain*, 610.

II. OF THE CIRCUIT COURTS.
4. Where the causes relied on in the petition for the nullity of a judg-

JURISDICTION (*continued*).

ment of a court of Louisiana are, under the Code of that State, vices of form, the Circuit Court of the United States has no jurisdiction to take cognizance of the suit upon a petition for its removal into that forum. *Barrow* v. *Hunton*, 80.

5. A suit between citizens of the same State cannot be sustained in the Circuit Court as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. *Hartell* v. *Tilghman*, 547.

6. Where a suit in equity, to enforce a lien on property within the district, was pending at the time of the passage of the act of June 1, 1872 (17 Stat. 196), and a party who was not an inhabitant of, or found within, the district was thereafter, by an amended bill, made a defendant, — *Held*, that the court could acquire jurisdiction in the mode prescribed by the thirteenth section of that act. *McBurney* v. *Carson*, 567.

III. Of the District Courts.

7. The admiralty jurisdiction of the district courts of the United States does not extend to seizures made on land. *United States* v. *Winchester*, 372.

8. The order of the President for the seizure, under the act of July 17, 1862 (12 Stat. 589), of the property of persons engaged in armed rebellion against the United States, or in aiding and abetting the rebellion, is a prerequisite to the exercise by the District Court of its jurisdiction to adjudge the forfeiture and decree the condemnation of such property. *Id.*

9. Cotton found on land in Mississippi was, Feb. 18, 1863, seized by the naval forces of the United States, without the order of the President, and delivered by an officer of the navy to the marshal of the United States for the Southern District of Illinois. A libel was filed in the District Court for that district, alleging as the ground of seizure that the cotton belonged to a person in armed rebellion against the United States. The cotton was sold, and a decree rendered, whereby one half of the proceeds was paid into the treasury of the United States, and the other half ordered to be paid to the officer as informer, who declined to accept it, and the check therefor was deposited with the assistant treasurer at St. Louis, on whom it had been drawn. At the instance of the admiral, the Supreme Court of the District of Columbia sitting in admiralty took jurisdiction of the case, and ordered the check to be deposited with the assistant treasurer at Washington, and the money to remain in his hands subject to the further order of the court. The check was so deposited, and the court by its decree distributed the money to the captors. *Held*, that the decrees were void, and that the owner

JURISDICTION (*continued*).
of the cotton was entitled to recover the net proceeds of the sale of it. *Id.*

IV. In General.

10. Although a court of equity has not within its territorial jurisdiction the real or the personal property, which is the subject-matter in controversy, it may, having the necessary parties before it, compel, by appropriate process, the performance of every act, which, if done voluntarily by them according to the *lex loci rei sitæ*, would give full effect to its decree *in personam*. *Phelps* v. *McDonald*, 298.

11. Whenever a statute grants a new right, or a new remedy for the violation of an old right, or whenever such rights and remedies are dependent on State statutes or on acts of Congress, the jurisdiction, as between the law side and the equity side of the Federal courts, must be determined by the essential character of the case. Unless it comes within some of the recognized heads of equitable jurisdiction, the remedy of the party is at law. *Van Norden* v. *Morton*, 378.

12. The jurisdiction of the Federal courts cannot be affected by State legislation, and they will enforce equitable rights created by such legislation if they have jurisdiction of the subject-matter and the parties. *Smith* v. *Railroad Company*, 398.

13. A county judge in New York has, under the authority of chapter 907 of the laws of that State, passed May 18, 1869, and the several laws amendatory thereof, jurisdiction to determine whether the conditions have been performed whereon a town in the county can lawfully subscribe for shares of the capital stock of a railroad company in that State, and issue its bonds to pay therefor. His judgment, until reversed by a higher court, is conclusive. *Orleans* v. *Platt*, 676.

14. The ruling in *Orleans* v. *Platt* (*supra*, p. 676), as to the jurisdiction of the county judge in New York to decide upon the application made to him by the tax-payers of a town for an order that its bonds be issued to enable it to subscribe and pay for shares of the capital stock of a railroad company, reaffirmed and applied to this case. *Lyons* v. *Munson*, 684.

15. His judgment in favor of the subscription cannot be collaterally attacked in a suit on the bonds brought against the town by a *bona fide* holder for value of them; and, where it is recited in them, the town is estopped from denying their validity. *Id.*

16. The Probate Court of Utah has jurisdiction to determine the conflicting rights of claimants to lots forming part of the lands in that Territory entered as a town site under the act of Congress of March 2, 1867 (14 Stat. 541), and an appeal may be taken from the judgment of that court to the District Court within one year after it has been rendered. *Cannon* v. *Pratt*, 619.

JUROR.

1. An error committed in overruling an objection to a juror as legally disqualified is cured, where it appears affirmatively that he was not a member of the panel which tried the case, and it does not appear that by his exclusion therefrom the party's right of challenge was abridged. *Burt* v. *Panjaud*, 180.
2. A person offered as a juror is not compelled to disclose under oath his guilt of a crime which would work his disqualification. If he declines to answer, the objecting party must prove such disqualification by other evidence. *Id.*
3. The right, under sect. 821 of the Revised Statutes, to require the panel of the jurors called to serve for a term to take the oath therein prescribed, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors in a case about to be tried. *Atwood* v. *Weems*, 183.

KANSAS. See *Estoppel*, 5; *Municipal Bonds*, 7, 11; *Taxation*, 1.

A county in Kansas is a body politic, whose powers are exercised by a board of county commissioners, and when it is sued, process must be served upon the clerk of the board. Where, therefore, a *mandamus* was awarded against it, — *Held*, 1. That the writ was properly directed to it in its corporate name. 2. That service of a copy of the writ upon the clerk is service upon the corporation, and the members of the board who fail to perform the required act are subject to be punished for contempt. *Commissioners* v. *Sellew*, 624.

KANSAS PACIFIC RAILWAY COMPANY. See *Denver Pacific Railway and Telegraph Company; Railroads, Net Earnings of*, 5.

LACHES. See *Equity*, 1; *Practice*, 9.

LAND GRANTS.

1. An act of Congress (14 Stat. 239) granted to a railroad company, to aid in the construction of its road, every section of public land designated by odd numbers, to the amount of "twenty alternate sections per mile (ten on each side) of said railroad line," and provided that, where any of said sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, the company should, in lieu thereof, select, under the direction of the Secretary of the Interior, other lands nearest to the limits of said sections, and not more than ten miles beyond them. There being a deficiency of said sections to satisfy the grant, the company, with the approval of said secretary, selected as part indemnity a quarter of an odd-numbered section of public land within ten miles beyond those limits, and obtained a patent therefor from the United States. When so selected, it was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had

LAND GRANTS (*continued*).
been finally rejected as invalid. *Held*, that the patent conveyed a perfect title to the company. *Ryan* v. *Railroad Company*, 382.
2. *Newhall* v. *Sanger* (92 U. S. 761) cited, and distinguished from this case. *Id.*

LANDS, CONTRACT FOR THE SALE OF. See *Decedent Estates*, 1; *New Hampshire, Statute of Frauds of.*
1. A., at the commencement of the late rebellion, owned property in San Antonio, Texas, consisting principally of real estate and stock in a gas company. Apprehending that his life was in danger in consequence of his avowed hostility to secession, he fled from the country, and, by a power of attorney, authorized B. to sell the property for whatever consideration and upon such terms as he might deem best, and to execute all proper instruments of transfer. B. took possession of the property, which he retained until July, 1865, when he gave the charge of it, with the business and papers in his hands, to C. A. thereupon wrote to C., "I wish you to manage [my property] as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." *Held*, that C. was thereby authorized to contract for the sale of the real estate, but not to convey it. *Lyon* v. *Pollock*, 668.
2. A deed executed to a purchaser, though invalid as a conveyance, may be good as a contract for the sale of the property described therein. *Id.*

LANDS HELD BY A CITY FOR PUBLIC PURPOSES.
Lands held by a city for public purposes, or ground rents arising therefrom and forming a part of its public revenues, are not subject to seizure and sale on execution. *Klein* v. *New Orleans*, 149.

LAPSE OF TIME. See *Equity*, 1.

LETTERS-PATENT. See *Jurisdiction*, 5.
The court will take judicial notice of a thing which is in the common knowledge and use of the people through the country. It therefore holds that reissued letters-patent No. 5748, granted to Matthias Terhune Jan. 27, 1874, for an alleged new and useful improvement in corner sockets for show-cases, are void for want of novelty. *Terhune* v. *Phillips*, 592.

LICENSE. See *Specific Performance.*

LIEN. See *Equity*, 2; *Internal Revenue*, 4; *Jurisdiction*, 6; *Mortgage*, 1–3, 5; *Mortgage, Equitable; Partnership Property; Railroads, Net Earnings of*, 5; *Specific Performance; Trust.*

LIMITATIONS, STATUTE OF. See *Assignee in Bankruptcy*, 2; *Equity*, 1; *Georgia, Statute of Limitations of.*
1. Continuous adverse possession of lands in California for five years

LIMITATIONS, STATUTE OF (*continued*).

bars an action of ejectment, if the plaintiff or those under whom he claims were under no disability when the cause of action first accrued. *Harris* v. *McGovern*, 161.

2. When the Statute of Limitations begins to run, no subsequent disability will arrest its progress. *Id.*

3. A. residing in New Orleans and B. in Mobile during the whole rebellion, consigned cotton which they owned to C., a supervising special agent of the Treasury Department. It arrived at Mobile on the last of July or the first of August, 1865, when it was claimed by them. It was consigned to him to facilitate its arrival, as the government had at that time charge of the railroads. C. having received orders from the Treasury Department to ship all cotton received by him, shipped in the latter month that of A. and B. to New York, where it was sold. The net proceeds were paid into the treasury. A. and B. brought suit for them against the United States in the Court of Claims, March, 27, 1872. *Held*, that the suit was barred by the Statute of Limitations. *Clark* v. *United States*, 493.

LOUISIANA. See *Causes, Removal of*, 1; *Estoppel*, 2; *Judicial Sale*, 2; *Railroads, Compensation to Mala Fide Purchasers of.*

MANDAMUS. See *Estoppel*, 5; *Kansas; Taxation*, 1, 3.

MARRIED WOMAN, PERSONAL JUDGMENT AGAINST.

In Mississippi, a judgment *in personam* against a married woman is void, unless the record discloses that she has a separate estate there situate, and the bill or declaration avers that the debt sought to be recovered is a charge upon it or ought to be paid out of it. *Bank* v. *Partee*, 325.

MERGER. See *Husband and Wife, Property held in Community by.*

MEXICAN LAND CLAIMS. See *Land Grants.*

MILITARY GOVERNOR. See *Decedent Estates*, 2.

MINING CLAIMS. See *Evidence*, 4, 5.

MINING DISTRICT, RECORD OF. See *Evidence*, 4, 5.

MINOR, EMANCIPATION OF.

Under articles 371 and 977 of the Civil Code of Louisiana, if a husband, after the death of his wife, mortgages community property for his debt, and afterwards dies while their son and heir is still a minor, but after he has been emancipated, the latter does not render himself liable for the debt as universal heir of his father by simply taking possession of the property and receiving to his own use the rents and profits thereof. *Gordon* v. *Gilfoil*, 168.

MISSISSIPPI. See *Married Woman, Personal Judgment against; Municipal Bonds*, 3.

The fourteenth section of the Constitution of Mississippi, ratified Dec. 1,

MISSISSIPPI (*continued*).

1869, which declares that "the legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or a regular election, to be held therein, shall assent thereto," is wholly prospective. It does not abrogate previous acts of the legislature conferring authority to subscribe for stock. *Supervisors* v. *Galbraith*, 214.

MONITION. See *Estoppel*, 2; *Judicial Sale*, 1.

MORTGAGE. See *Mortgage, Equitable; Town-Site Act*, 1; *Union Pacific Railroad Company*, 1.

1. On Feb. 1, 1873, a railroad company in Illinois entered into a contract with A., whereby he agreed to sell and deliver to it, at a price payable in instalments, a number of cars, which, until they should be paid for, were to remain his property. They, when delivered, were numbered, marked, and lettered as his property, and were thereafter used in the ordinary business of the company. Prior to said contract the company had mortgaged to B., as trustee, its franchises, issues, and profits, and all the property it then possessed or might thereafter acquire, either in law or in equity, to secure the payment of certain bonds. B. filed, May 20, 1875, his bill for foreclosure. The receiver appointed by the court to take charge of the road, finding that the cars had not been paid for, and that they were necessary for its use, entered into an arrangement with A., subject to the approval of the court, by which they were valued at $420 each; and it was agreed that a monthly rent of $7 should be paid for each, with interest on the deferred payments, until the amount so paid should equal the value of the cars. They were then to become the property of the company. A., in January, 1876, intervened in the foreclosure suit, and after averring the payment of the rent during the period the receiver had used the cars, prayed that, out of any funds standing to the credit of the cause not otherwise appropriated, he should be paid for the use of the cars from October, 1874, when the last instalment of the purchase-money therefor had been paid, and that the cars be returned to him. B. and certain intervening bondholders, claiming that the cars, the title thereto having passed to the company under the contract, were, as after-acquired property, subject to the lien of the mortgage, denied that A. was entitled to payment for said use from the income of the road or from the proceeds of the sale, or to a return of the cars. The court, Dec. 6, 1876, ordered the sale of the mortgaged property, not including the cars. It was thereupon sold, the sale confirmed, and a conveyance to the purchasers ordered. Subsequently the court decreed that as A. had not parted with his title, the cars should be returned to him, and that the clerk should, out of the funds standing to the credit of the

MORTGAGE (*continued*).

cause, pay to him $14,568.75 as rent for the period the cars were in use before the appointment of the receiver. It does not appear that there were any funds in court to the credit of the cause except such as arose from the sale. *Held*, 1. That the lien of the mortgage did not attach to the cars upon their delivery to the company so as to defeat A.'s reclamation of them as against the mortgagee. 2. That the payment out of the earnings of the road for rent of the cars for the time they were used by the receiver was proper. 3. That *prima facie* the fund to the credit of the cause belonged to the mortgage creditors, and that A., being only a general creditor, is not entitled to payment therefrom. *Fosdick* v. *Schall*, 235.

2. The ruling in *Fosdick* v. *Schall* (*supra*, p. 235), that where a contract between A. and a railroad company for furnishing it cars provides that they shall be his property until paid for, a pre-existing mortgage by the company of all its then property, or that which it might thereafter acquire, does not subordinate the claim of A. for the price of the cars to the lien of the mortgage, reaffirmed and applied to this case. *Fosdick* v. *Car Company*, 256.

3. The ruling in *Fosdick* v. *Schall* (*supra*, p. 235), that the funds in the hands of a receiver of a railroad appointed in a suit to foreclose a mortgage executed by the company must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors of the company, reaffirmed and applied to this case. *Huidekoper* v. *Locomotive Works*, 258.

4. In the mortgage of a railroad it was covenanted and agreed by all the parties thereto, that, in case of a foreclosure sale of the mortgaged property under a decree, the trustee named in the mortgage should, on the written request of the holders of a majority of the then outstanding bonds thereby secured, purchase the property at such sale for the use and benefit of the holders of such bonds, and that the right and title thereto should vest in him, no holder to have any claim to the proceeds except his *pro rata* share thereof, as represented in a new company or corporation, to be formed for their use and benefit; and that the trustee might take such lawful measures to organize a new company for their benefit, upon such terms, conditions, and limitations as the holders of a majority of the bonds should in writing request or direct, and he should thereupon reconvey the premises so purchased to such new company. On default of payment a suit was brought by the trustee against the mortgagor and subsequent mortgagees, praying for a foreclosure of the first mortgage, and for general relief. *Held*, 1. That such an agreement inures equally to the benefit of such bondholders, and that each holds his interest subject to the controlling power given to the majority of them. 2. That the trustee, the *cestui que trust*, and the trust itself being before the court, and it appearing that the holders of a majority of the bonds had in writing requested and directed the

MORTGAGE (*continued*).

trustee, if he became the purchaser of the property, to convey it to a new corporation, the court might authorize and direct him to bid at the sale at least the amount of the principal and interest of the first-mortgage bonds, and might provide for a complete execution of the trust. 3. That though the specific relief sought was a strict foreclosure, a decree for a sale of the property and for the enforcement of the agreement contained in the deed was, under the prayer for general relief, appropriate. 4. That it was not error for the court to require that if a person other than the trustee became the purchaser at the sale he should pay at once, in cash, a part of his bid as earnest money. 5. That where some of the first-mortgage bondholders were permitted to intervene as parties to prosecute, for the protection of their several interests, an appeal from the decree for a sale of the property, and the appeal not having been made a *supersedeas*, the decree was executed, they cannot object to orders made prior to the decree, nor assign for error any part of it which is not injurious to their interests. *Sage* v. *Central Railroad Company*, 334.

6. Mortgages of the road and present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, are, while it retains possession, a prior lien upon the net earnings of the road. *Hale* v. *Frost*, 389.

MORTGAGE, EQUITABLE.

A customer of a bank, who had deposited with it, as collateral security for his current indebtedness on discounts, the note of a third person secured by mortgage, and had withdrawn the same after maturity, for the purpose of foreclosure and collection, under an agreement to return the proceeds, or to replace the note by securities of equal value, purchased the mortgaged property at the foreclosure sale. At the request of the bank he deposited with it the deed he had received for the property. His indebtedness to the bank was then fully paid, and his dealings with it were temporarily suspended. He afterwards incurred debts to it; and on his becoming an adjudicated bankrupt, it filed its bill against his assignee, claiming an equitable lien in its favor upon the property. The bill contained no allegation of money loaned or debt created on the faith of the deposit of the deed, and it prayed for the specific performance of the agreement to replace the note withdrawn. *Held*, that the bank could not claim an equitable mortgage by such deposit. *Biebinger* v. *Continental Bank*, 143.

MOTIONS. See *Practice*, 16.

MUNICIPAL BONDS. See *Estoppel*, 3, 4, 5; *Jurisdiction*, 13–15; *Mississippi; Taxation*, 1, 3, 4.

1. If a city issues bonds under its corporate seal, and in accordance with its charter, which empowers the council, with the sanction of a majority of voters attending an election for the purpose, to borrow

MUNICIPAL BONDS (*continued*).

money generally and to issue bonds therefor, and the bonds recite upon their face that they are issued in accordance with certain ordinances of the city, the titles of which, being quoted alone in the bonds, characterize the ordinances as providing for a loan for municipal purposes, the city is estopped, in a suit upon the bonds by an innocent purchaser for value, to set up that the ordinances appropriated the money to other purposes, and that the bonds were, therefore, void. *Hackett* v. *Ottawa*, 86.

2. A town in Wisconsin having, pursuant to law, voted to issue its bonds in aid of the construction of a railroad in that State, the bonds bearing date June 1, 1871, and signed by A. as chairman of the board of supervisors, and by B. as town clerk, were issued, and by A. delivered to the railroad company. When sued on the coupons by a *bona fide* holder of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B. until July 13, at which date he had ceased to be town clerk, his resignation of that office having been, June 17, tendered and accepted, and his successor duly elected and qualified. *Held*, 1. That the town was estopped from denying the date of the bonds. 2. That in the absence of any thing to the contrary, it must be assumed for all the purposes of this case that the bonds were delivered to the company by A., with the assent of the then town clerk, and that they were, therefore, issued by the proper officers of the town. *Town of Weyauwega* v. *Ayling*, 112.

3. An act of the legislature of Mississippi, approved Feb. 10, 1860, authorized the county of Calhoun, among others, to subscribe to the capital stock of a railroad company, provided that at an election in the county, of which and of the amount to be subscribed, and in what number of instalments, twenty days' notice should be given, a majority of the qualified electors voting should be in favor of the subscription. The proposition, when first submitted, was rejected; but at a second election the vote was in favor of the subscription. An act, passed March 25, 1871, declared that the bonds issued in payment of previous subscriptions should be made payable to the president and directors of the company and their successors and assigns. The bonds were issued Sept. 1, 1871, payable to the railroad company, or bearer, ten years thereafter, at the agency of the company in the city of New York. They recite that they are issued in payment of the county subscription to the capital stock of the company, in pursuance of the said acts, and in obedience to a vote of the people of the county, at an election held in accordance therewith. In a suit on the bonds, — *Held*, 1. That the requirement that they should be made payable to the president and directors of the company, and their successors and assigns, is only directory; and that the recital therein estops the county from taking any advantage of the irregularity committed by its servants. 2. That no place of

MUNICIPAL BONDS (*continued*).
payment having been designated by the act, it was competent to make the bonds payable in New York. 3. That as in that State they could, after being assigned in blank, pass by delivery from hand to hand, and have all the properties of commercial paper, the result is the same as if they had been drawn in literal conformity with the statute. 4. That, in the absence of any prohibition in the act against more than one submission to the electors of the question of making the subscription, the second vote was not unlawful. *Supervisors* v. *Galbraith*, 214.

4. Where the authorities of a town in Illinois, being thereunto empowered, subscribed in its behalf for stock in a railroad company, and issued its coupon bonds in payment therefor, the town, when sued by a *bona fide* purchaser for value of the coupons before maturity, cannot set up as a defence that the company disregarded its promise to construct the road, or that the town officers delivered the bonds in violation of special conditions not required by statute, and of which he had no knowledge or notice. *Brooklyn* v. *Insurance Company*, 362.

5. Where the bonds were signed by the town officers designated for that purpose by the charter of the company which authorized the issue of the bonds, after the requisite popular vote and the subscription, it is not necessary that the board of auditors or the other corporate authorities should participate in their issue and delivery. *Id.*

6. Where a suit was brought by the town in the county court against the company and others, and a decree rendered that the bonds and coupons were null and void and should be surrendered for cancellation, — *Held*, that the decree bound the parties who were personally served with process or who appeared, and did not affect the other holders of the securities, who had only constructive notice of the suit. *Id.*

7. Bonds of a township in Kansas payable to A., a railroad company, or bearer, were duly executed by the township trustee and township clerk, acting in their official capacity, as its legal representatives. They recite that they were issued pursuant to an order of the proper officers of the township, made by authority of an act of the legislature which is therein cited, and were ordered by the qualified electors of the township, at an election duly held. An action was brought by a *bona fide* holder for value of the interest coupons attached to some of the bonds, who had no notice of any fact impairing their validity. *Held*, that it is not a defence to the action that at the time of voting and that of issuing the bonds their entire amount was in excess of the proportion which by law they should bear to the taxable property of the township, or that after the vote at said election had been cast in favor of subscribing for stock in B., a railroad company, the subscription was made for stock in A., and

MUNICIPAL BONDS (*continued*).

said bonds issued in payment therefor, B. having, under a law existing at the time of said election, become merged and consolidated with A. to form a continuous line of road. *Wilson* v. *Salamanca*, 499.

8. This case distinguished from *Harshman* v. *Bates County*, 92 U. S. 560. *Id.*

9. In May, 1871, certain parties claiming to be a majority of the tax-payers, and to own the greater part of the taxable property of a town in New York, petitioned the proper county judge for an order that its bonds, to the amount of $80,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of A., a railroad company. After hearing, he, July 1, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. Application was thereupon made by sundry tax-payers to the Supreme Court for a writ of *certiorari*, which was allowed, Sept. 30, 1871, and served upon him. The proper return was made. June 27, 1872, the Supreme Court affirmed the judgment. In July following, the case was taken to the Court of Appeals, where, solely upon the ground that he had refused the application of tax-payers to withdraw their signatures from the petitions, which, had it been granted, would have reduced the numbers and the taxable property represented below the statutory requirement, the previous judgment was, in February, 1873, reversed, with directions to dismiss the proceeding. April 3, 1872, the commissioners subscribed for eight hundred shares of the stock of A., and on the next day issued and delivered in payment one hundred and sixty of the bonds of the town of $500 each, and thereupon received from A. scrip for the stock, which the town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. A., Feb. 26, 1872, and May 31, 1873, entered into contracts with another railroad company, and at the latter date delivered as collateral security for the fulfilment of both contracts all the bonds to B., with authority to him to sell them and pay over the proceeds to the latter company. Feb. 4, 1874, the plaintiff purchased some of the bonds in good faith for a valuable consideration. He subsequently brought suit against the town to recover the amount due on the coupons. *Held*, that the plaintiff is entitled to recover. *Orleans* v. *Platt*, 676.

10. *County of Warren* v. *Marcy* (97 U. S. 96) cited and approved. *Id.*

11. A *bona fide* purchaser for a valuable consideration of municipal bonds, who had no actual notice of any defence which could be set up against them, is not bound to look further than to see that there was legislative authority for their issue, and that the officers who were thereunto authorized have decided that the precedent conditions upon which it was allowed to be exercised have been fulfilled. If that authority was conferred, and such a decision made, the bonds

MUNICIPAL BONDS (*continued*).

are valid obligations which he may enforce. *Block* v. *Commissioners*, 686.

12. Where, pursuant to a statute of Kansas, entitled "An Act authorizing counties and cities to issue bonds to railroad companies," approved Feb. 10, 1865, as amended Feb. 26, 1866, an election was held in a county in that State upon the question of a county subscription to the capital stock of "any railroad company," then, or thereafter to be, organized, which should construct a railroad from a point in Missouri to a point in the county, and the result having, May 8, 1867, been declared by the proper authorities to be in favor of the subscription, and so entered on their minutes, the bonds were, in 1870, issued in payment of the subscription to a Missouri company which caused the road to be built. *Held*, that the subscription was binding, and that the county, in an action on the bonds by a *bona fide* purchaser, is estopped from asserting that, in fact, a majority of the qualified electors had not voted in favor of the issue of the bonds. *Id.*

MUNICIPAL CORPORATIONS. See *Kansas; Mississippi.*

1. *Semble*, that the borrowing of money by a city for the development of its natural resources for manufacturing purposes is within the provision of the Illinois Constitution of 1848, that corporate authorities may be empowered "to assess and collect taxes for corporate purposes," as interpreted by the Supreme Court of the State. *Hackett* v. *Ottawa*, 86.
2. That which the law authorizes a city to do in improving its streets cannot be a nuisance such as to give a common-law right of action. *Transportation Company* v. *Chicago*, 635.
3. A municipal corporation, authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, where it crosses the street, incurs no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute. *Id.*
4. If the fee of the street is in the adjoining lot-owners, the State has an easement to adapt the street to easy and safe passage over its entire length and breadth. When making or improving the streets within its limits, in the exercise of an authority conferred by statute, a city is the agent of the State, and, if it acts within that authority, and with due care, despatch, and skill, is not at common law answerable for consequential damages. *Id.*
5. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor. *Id.*
6. During its change from a town to a village organization, under the

MUNICIPAL CORPORATIONS (*continued*).

statute of Illinois of April 10, 1872, the corporation is not released from the obligation to exercise the power with which it is invested to keep its streets and sidewalks in a safe condition. For neglect in that regard, it is liable to a party who thereby sustains special damages. *Evanston* v. *Gunn*, 660.

7. Inasmuch as the village succeeds to all the property and funds as well as to the liabilities of the town, and has power to borrow money to provide for improvements rendered necessary by any casualty or accident happening after the annual appropriation, it cannot, when sued by such party, set up that its board of trustees were unauthorized to make that appropriation for the year in which the plaintiff's injury occurred, nor that the board and the other officers of the village were prohibited by law from adding to the corporate expenditures in any one year an amount above that provided for in the annual appropriation bill for that year. *Id.*

NATIONAL BANK. See *Stockholders, Personal Liability of*, 2.

1. A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. *National Bank* v. *Case*, 628.

2. A national bank which had so accepted, and caused to be transferred to it, shares of stock of another national bank, was, on the latter becoming insolvent, sued as a stockholder. *Held*, that a loan of money by a national bank on such security is not prohibited by law; and, if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom. *Id.*

NEGOTIABLE SECURITIES. See *Municipal Bonds*, 3.

Certain bonds of a railroad company in Louisiana, promising to pay to the bearer either £225 sterling in London, or $1,000 in New York or in New Orleans, declared that the president of the company was authorized to fix by his indorsement the place of payment. On their back were printed the following words: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——." The blank for the place of payment was not filled. The bonds were never issued by the company, but were seized and carried off during the late war. They, and the past-due coupons thereto attached, were purchased in New York for a very small consideration. *Held*, 1. That, in the absence of the required indorsement, the uncertainty of the amount payable is a defect which deprives the bonds of the character of negotiability. 2. That the purchaser was affected with notice of their invalidity, and does not sustain the position of a *bona fide* holder without notice. *Parsons* v. *Jackson*, 434.

NET EARNINGS. See *Railroads, Net Earnings of.*

NEVADA. See *Contracts*, 7.

NEW HAMPSHIRE, STATUTE OF FRAUDS OF.

In order to satisfy the requirements of the Statute of Frauds of New Hampshire, the memorandum in writing of an agreement for the sale of lands which is signed by the party to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by that party, the other contracting party must be so designated that he can be identified without parol proof. *Grafton* v. *Cummings*, 100.

NEW TRIAL. See *Causes, Removal of*, 3–5; *Practice*, 1, 2, 6.

NEW YORK. See *Jurisdiction*, 13–15; *Municipal Bonds*, 9.

NOVELTY. See *Letters-patent.*

NUISANCE.

That which the law authorizes cannot be a nuisance such as to give a common-law right of action. *Transportation Company* v. *Chicago*, 635.

OATH. See *Juror*, 2, 3.

OFFENCES AGAINST THE UNITED STATES. See *Accomplice.*

OFFICERS OF THE UNITED STATES.

1. Civil surgeons appointed by the Commissioner of Pensions under sect. 4777 of the Revised Statutes are not officers of the United States. *United States* v. *Germaine*, 508.
2. The Commissioner of Pensions is not the head of a department, within the meaning of sect. 2, art. 2, of the Constitution, prescribing by whom officers of the United States shall be appointed. *Id.*

PACIFIC RAILROAD ACTS. See *Denver Pacific Railway and Telegraph Company; Railroads, Net Earnings of*, 2–7; *Right of Way by Railroad Company, Priority of; Union Pacific Railway Company.*

PAROL EVIDENCE. See *Evidence*, 1.

PARTIES. See *Florida, Internal Improvement Fund of*, 2; *Specific Performance.*

The objection that the defendants to an amended bill were all necessary parties to a supplemental bill filed in the same cause, cannot be made for the first time in this court. *McBurney* v. *Carson*, 567.

PARTNERSHIP, DISSOLUTION OF. See *Internal Revenue*, 3.

1. A., B., and C., who were partners as attorneys and counsellors-at-law, agreed that the general partnership between them should terminate March 18, 1869; that thereafter no new business should be received by the firm, and that any coming to it through the mails should be

PARTNERSHIP, DISSOLUTION OF (*continued*).

equitably divided. It was also stipulated that the business then in hand should be closed up as rapidly as possible by them "as partners, under their original terms of association and in the firm name." They agreed, Aug. 13, 1869, that in case of the death of either of them, his heirs or personal representatives should receive one-third of the fees in cases nearly finished, and twenty-five per cent in other partnership cases. A. having died, his executor filed his bill against B. and C. for a discovery, and to recover A.'s share in the fees received by them out of the partnership business which remained unfinished when the firm was dissolved. *Held*, 1. That a court of chancery had jurisdiction to entertain the bill, and power to decree the relief asked so far as the fees had been collected. 2. That the partners having by the agreement of August 13 provided for the division of the fees in case of the death of either of them, the survivors were entitled to no allowance for winding up the business, other than their share of the fees as specified in said agreement. *Denver* v. *Roane*, 355.

2. Where an attorney-at-law refuses to act as a partner, or to perform the functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause. *Id.*

PARTNERSHIP PROPERTY.

A member of a firm assigned and transfered in good faith his interest in the partnership property in payment of a just debt for which he was solely liable. The creditor took possession of it and sold it to A., who, by an act of sale, in which the other member of the firm united, transferred it for a valuable consideration to B. The firm and the members of it were insolvent. C., claiming to be a simple-contract creditor of the firm, then filed his bill to subject the property to the payment of his debt. *Held*, that C. had no specific lien on the property, and, there being no trust which a court of equity can enforce, the bill cannot be sustained. *Case* v. *Beauregard*, 119.

PASSENGERS, TRANSPORTATION OF.

A canal-boat laden with coal for transportation, having on board the master, with his family, is not a "barge carrying passengers," within the meaning of sect. 4492 of the Revised Statutes, which requires that such a barge, while in tow of a steamer, shall be provided with "fire-buckets, axes, life-preservers, and yawls." *Transportation Line* v. *Cooper*, 78.

PENALTIES. See *Internal Revenue*, 2, 3.

Penalties are never extended by implication. Unless expressly imposed, they cannot be enforced. *Elliott* v. *Railroad Company*, 573.

PLEADING. See *Florida, Internal Improvement Fund of*, 2; *Husband and Wife, Property held in Community by; Stockholders, Personal Liability of*, 1.

1. Conclusions of law are not admitted by a demurrer. *United States* v. *Ames*, 35.
2. A person accused of an offence against the United States cannot plead, in bar of proceedings against him or his property, a contract which has been entered into with him by the district attorney, whereby the latter agreed that the accused should not be prosecuted if he, when examined as a witness for the government against his accomplices, disclosed fully and fairly his and their guilt, nor avail himself of it upon the trial, but has merely an equitable title to executive mercy, of which the court can take notice only when an application to postpone the case is made in order to give him an opportunity to apply to the pardoning power. *Whiskey Cases*, 594.

PRACTICE. See *Accomplice*, 2; *Admiralty*, 1; *Appeal; Jurisdiction*, 3, 6; *Mortgage*, 4.

1. Where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose. *Mills* v. *Scott*, 25.
2. An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties. *Campbell* v. *Rankin*, 261.
3. Where, in a suit arising under the act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 id. 375), no direct proof was given that the proceeds of the sale of the property were paid into the treasury, if the circumstantial facts which are established by the evidence are set forth in the finding of the Court of Claims, which it sends here as that upon which alone its judgment was rendered, and they are, in the absence of any thing to the contrary, the legal equivalent of a direct finding that such proceeds were so paid, this court will not on that account reverse the judgment. *United States* v. *Pugh*, 265.
4. The judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is, if the question is properly presented, subject on appeal to be here reviewed; and where the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record. *Id.*
5. *United States* v. *Crusell* (14 Wall. 1), *Same* v. *Ross* (92 U. S. 281), and *Intermingled Cotton Cases* (id. 651), so far as they bear upon

PRACTICE (*continued*).

the rule requiring, on an appeal from the Court of Claims, a finding by that court of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them, cited and explained. *Id.*

6. In an action of debt, the jury were sworn to try "the issue." Two issues were joined, and the jury found "the issue" for the plaintiff, and assessed his damages. Judgment was rendered therefor. On a subsequent day of the term, the defendant moved the court to set aside the judgment and grant a new trial, but filed no reasons therefor, and thereafter failed to appear. The record presents no bill of exceptions showing to what point the evidence at the trial was directed. *Held*, that the denial of the motion furnished no ground for reversing the judgment. *Brooklyn* v. *Insurance Company*, 362.

7. Where the trustees or directors of a corporation have appealed from a decree, and directed their counsel to prosecute the appeal, this court will not dismiss it on the motion of strangers to the decree who, since it was rendered, have become the owners of a majority of the stock of the corporation. *Railway Company* v. *Alling*, 463.

8. Such trustees or directors are in law the managers of the property and affairs of the corporation. As such they, in all litigation involving its action, represent it, its stockholders and creditors. If they violate their trust, the remedy must be sought in some court of original jurisdiction. *Id.*

9. An appeal will be dismissed, where, at the term to which it was returnable, the transcript was, by reason of the laches of the appellant, not filed, or the cause docketed in this court. *Grigsby* v. *Purcell*, 505.

10. The appellee at any time before the hearing may take advantage of the objection, or the court upon its own motion may dismiss the appeal. *Id.*

11. In an action upon a contract the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, the property for the non-delivery of which the action was brought. *Colby* v. *Reed*, 560.

12. The objection that the defendants to an amended bill were all necessary parties to a supplemental bill filed in the same cause cannot be made for the first time in this court. *McBurney* v. *Carson*, 567.

13. The jury should not be instructed to find for the defendant, unless the evidence is such as to leave no doubt that it is their duty to return a verdict in his favor. *Pence* v. *Langdon*, 578.

14. The court announces its determination to enforce rigidly the rules requiring causes to be ready for hearing when they are reached. *Alvord* v. *United States*, 593.

PRACTICE (*continued*).

15. Counsel who enter their appearance under the requirements of Rule 9 will be held responsible for all that such an entry implies, until, by substitution or otherwise, they are relieved from the obligation they have assumed. *Id.*

16. Under amended Rule 6 the plaintiff in error, or the appellant, may, with a motion to dismiss the writ of error or the appeal, unite a motion to affirm the judgment or the decree; but where there is no color of right to a dismissal, the case being clearly within the jurisdiction of this court, a motion to affirm merely will not be sustained. *Whitney* v. *Cook*, 607.

17. The court declares that it will by the assessment of damages suppress the evil of resorting to its jurisdiction upon frivolous grounds. *Id.*

18. Where a judgment was rendered October 5, and the present term commenced October 15, and the writ of error and citation were returnable on the "second Monday in October next," the court, March 17, grants, on motion of the plaintiff in error, an order allowing the writ to be amended by inserting the third Monday of the term as the return-day thereof, but requires him to cause a new citation returnable on the first Monday of the following May to be issued and served. *National Bank* v. *Bank of Commerce*, 608.

19. Where the record of a suit is duly certified upon an appeal to a district court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its order refusing a new trial and from its judgment are taken to the Supreme Court of that Territory, the statute whereof requires a statement, to be settled by the judge who heard the cause, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them, and no more;" and where a statement settled and signed by him, and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the District Court, upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to the said Supreme Court, — *Held*, 1. That the proceeding was thus made to conform to the requirements of the Practice Act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. 2. That if that court reverses the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing here; but if it has all the evidence which could be considered below, should the case be remanded, it may state the facts established by the evidence and render judgment. On an appeal to this court, the case, if otherwise properly here, will be determined upon the facts so stated

PRACTICE (*continued*).

8. That if the findings of the District Court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the said Supreme Court, and they, for the purpose of an appeal here, furnish a sufficient statement of the facts of the case, within the meaning of the act "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874. 18 Stat. pt. 3, p. 27. *Stringfellow* v. *Cain*, 610.

20. A judgment will not be reversed for error in excluding testimony which is cumulative only, when it is apparent that if received it would not affect the result. *Cannon* v. *Pratt*, 619.

21. A party specifying his objection to the admission of evidence must be considered as waiving all others, or as conceding that there is no ground upon which they can be maintained. *Evanston* v. *Gunn*, 660.

22. Where the charge to the jury taken as a whole fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification. *Id.*

23. Where, upon the undisputed facts of the case, the plaintiff is entitled to recover, it is not error for the court to instruct the jury to find for him. *Orleans* v. *Platt*, 676.

24. Where the testimony is all one way, a party is not entitled to instructions which assume that it is otherwise. *Id.*

PRAIRIE DU CHIEN, TREATY OF.

By the ninth article of the treaty of Prairie du Chien, proclaimed Feb. 24, 1831 (7 Stat. 330), a certain tract of country in the then Territory of Minnesota was reserved for Sioux half-breeds, "they holding by the same title and in the same manner that other Indian titles are held." By the act of July 17, 1854 (10 id. 304), the President, upon their relinquishment of all their rights and interest in the tract so reserved, was authorized to cause to be issued "certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants, which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements: *Provided*, that no transfer or conveyance of any of said certificates or scrip shall be valid." A. made a contract, whereby, for a valuable consideration, he bound himself to

PRAIRIE DU CHIEN, TREATY OF (*continued*).
secure, upon the location of certain of said certificates, title to the land thereby located to be lawfully vested in B. *Held*, 1. That the contract is not in violation of said treaty or said act. 2. That the certificates may be located lawfully not only on unoccupied lands, but upon such as are occupied, provided that the occupants thereof waive the provision for their benefit, and consent to such location. 3. That the words, "upon which they have respectively made improvements," have exclusive reference to "other unsurveyed lands," and do not qualify the provision touching "other unoccupied lands." *Myrick* v. *Thompson*, 291.

PRE-EMPTION. See *Prairie du Chien, Treaty of; Union Pacific Railroad Company*, 1.

PRESCRIPTION, PLEA OF. See *Husband and Wife, Property held in Community by.*

PROCESS. See *Jurisdiction*, 6, 10; *Kansas.*

PROPERTY, TAKING OF, FOR PUBLIC USES. See *Municipal Corporations*, 5.

PUBLICATION, NOTICE BY. See *Jurisdiction*, 6.
Where the decree required notice of the sale of the property to be advertised in certain newspapers, among which was A., printed in a certain city, and it appearing that, before such advertisement was made, A. had been merged into B., or that its name had been changed to B., — *Held*, that the identity of the paper remaining, the advertisement in B. was a substantial compliance with the order. *Sage* v. *Central Railroad Company*, 334.

PUBLIC LANDS. See *Land Grants.*

PUBLISHER. See *Copyright.*

RAILROAD COMPANIES, CONSOLIDATION OF. See *Municipal Bonds*, 7.

RAILROADS. See *Land Grants; Mortgage.*

RAILROADS, COMPENSATION TO MALA FIDE POSSESSORS OF, FOR INSEPARABLE IMPROVEMENTS.
1. In Louisiana, where a railroad, in a state of complete dilapidation and ruin, was sold under a mortgage, under circumstances which, importing some fraud in the purchasers, induced the court to set the sale aside and order a resale, such purchasers, though deemed possessors in bad faith, are entitled, by the spirit of article 508 of the Civil Code of that State, to compensation for reconstructing and repairing the road and putting it in working order. *Jackson* v. *Ludeling*, 513.
2. Whatever question may exist about compensation for inseparable improvements made by a possessor in bad faith, there is no que-

RAILROADS, COMPENSATION TO MALA FIDE POSSESSORS OF, FOR INSEPARABLE IMPROVEMENTS (*continued*).

tion about his right to be reimbursed for necessary repairs, both according to article 2314 of that code and to the general civil law. *Id.*

3. It seems to be held in Louisiana, contrary to former decisions, that compensation will not be allowed to the possessor in bad faith for inseparable improvements to land, such as clearing and ditching; but reconstructing a railroad and putting it in working order, thereby restoring it to its normal condition, partake so much of the nature of repairs, that compensation therefor is required, by an equitable construction of article 508 of the Civil Code. *Id.*

4. The rule of compensation in such a case is to allow credit to the possessors for the value of the materials of such improvements as are yet in existence, and the cost of the labor bestowed thereon, not to exceed their value when deliverd up; but not for the improvements which were consumed in the use. Interest on the outlay of the possessors will also be allowed to an amount not exceeding the net earnings, or fruits, received from the improvements. They will be accountable, however, for all the fruits received by them from the property, and will have a lien on it for any balance found to be due them on such an accounting. *Quære*, Are they accountable for such fruits beyond the allowance made to them for the improvements? *Id.*

RAILROADS, NET EARNINGS OF. See *Mortgage*, 5.

1. The net earnings, while the road is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. *So held*, where from such earnings payment was made to parties who had, before his appointment, furnished the company with car-springs, and spirals and supplies for its machinery department, which he continued to use in carrying on the business of the road. *Hale* v. *Frost*, 389.

2. The "earnings" of the Union Pacific Railroad include all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transportation of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company. *Union Pacific Railroad Company* v. *United States*, 402.

3. The case of the Central Pacific Railroad Company, in all material respects, involves the same questions as *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), and the court adheres to the conclusion there announced as to the time when the road must be con-

RAILROADS, NET EARNINGS OF (*continued*).
sidered as completed, so as to render the company thereafter liable to pay annually five per cent of the net earnings of the road for the purposes mentioned in the sixth section of the act of July 1, 1862. 12 Stat. 489. *United States* v. *Central Pacific Railroad Company*, 449.

4. The rulings in that case upon the question of the earnings and expenditures of the road, and upon the principles by which the amount of net earnings is to be ascertained and in what manner paid, reaffirmed. *Id.*

5. The bonds granted by the United States to the Kansas Pacific Railway Company are not a lien on, nor is the company liable for five per cent of the net earnings of, that portion of its road west of the one hundredth meridian. *United States* v. *Kansas Pacific Railway Company*, 455.

6. The court adheres to the rulings in *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), as to the principle which should govern in determining the amount of net earnings. In regard to certain items claimed by the Kansas Pacific Railway Company as proper deductions from the gross receipts of the road, the following should be excluded, — money needed to place it in proper repair, but not actually expended for that purpose; the expenses of the land department; the interest on the funded debt, which has priority over the lien of the United States; and the fifty per cent retained by the latter from the amount due for services rendered to it: and that the following items should be allowed, provided they were actually paid out of the earnings of the road, and not raised by bonds or stock, — the equipment account, or replacing and rebuilding rolling-stock, machinery, &c.; the amounts paid for depot grounds, and the expenses of same; and the construction account, or improvements and additions to the track, &c. *Id.*

7 The ruling in *Union Pacific Railroad Company* v. *United States* (*supra*, p. 402), that the United States is not entitled to recover if, during the period for which it claims the five per cent of the net earnings of any road, to aid in the construction of which the bonds of the United States were granted under the Pacific Railroad acts, such earnings were absorbed by the interest accruing on the first-mortgage bonds of the company, reaffirmed. *United States* v. *Sioux City and Pacific Railroad Company*, 491.

REBELLION, THE. See *Decedent Estates*, 2.

RECEIVER. See *Florida, Internal Improvement Fund of*; *Mortgage*, 1–3; *Railroads, Net Earnings of*, 1; *Specific Performance*.

RECORD.

An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties. *Campbell* v. *Rankin*, 261.

REMOVAL OF CAUSES. See *Causes, Removal of.*

REPEAL. See *Abandoned and Captured Property Act.*

REPLEVIN BOND. See *Bankruptcy.*

RES ADJUDICATA. See *Estoppel*, 2.

RESCISSION. See *Contracts*, 7–9.

REVISED STATUTES OF THE UNITED STATES.

The following sections referred to and explained: —

Sect. 821. See *Juror*, 8.
Sect. 3150. See *Internal Revenue, Collector of*, 2.
Sect. 3163. See *Internal Revenue, Collector of*, 1.
Sect. 3232. See *Internal Revenue*, 2.
Sect. 3309. See *Internal Revenue*, 4.
Sect. 4492. See *Passengers, Transportation of.*
Sect. 4777. See *Civil Surgeons.*
Sect. 5068. See *Bankruptcy*, 1.
Sect. 5117. See *Bankruptcy*, 1.

RIGHT OF WAY BY RAILROAD COMPANY, PRIORITY OF.

An act entitled "An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June 8, 1872 (17 Stat. 339); an act amendatory thereof, approved March 3, 1877 (19 Stat. 405); and an act entitled "An Act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875 (18 Stat. 482), — considered with reference to the conflicting claims of the Denver and Rio Grande Railroad Company, and the Cañon City and San Juan Railway Company, to occupy and use the Grand or Big Cañon of the Arkansas for railroad purposes. *Held*, 1. That said act of 1872 granted an immediate beneficial easement in a particular way over which the routes designated in the charter of the Denver Company lay, capable, however, of enjoyment only when such way should actually and in good faith be appropriated for the purposes contemplated by that charter, and then the title thereto would take effect by relation as of the date of the act. 2. That that company finally appropriated the right of way through the cañon April 9, 1878, and was by its prior occupany entitled to the benefits conferred by said act of 1872. 3. That both companies should be allowed to proceed with the construction of their respective roads through said cañon where it is broad enough for them to do so without interfering with each other; but where, in the narrow portions of the defile, this is impracticable, the court below, while recognizing and enforcing the prior title of the Denver Company, should, by proper orders, secure upon just and equitable terms the right of the Cañon City Company, under said act of 1875, to use, in common with the Denver Company, the same road-bed and track, after the same shall have been completed. *Railway Company* v. *Alling*, 463.

SCRIP, LOCATION OF. See *Prairie du Chien, Treaty of.*

SENTENCE. See *Criminal Law.*

SINKING-FUND. See *Constitutional Law*, 3–6; *Florida, Internal Improvement Fund of; Union Pacific Railroad Company*, 5, 6.

SHERIFF, SALE BY. See *Judicial Sale*, 2.

SIGNAL SERVICE OF THE UNITED STATES, RECORD KEPT BY PERSON EMPLOYED IN. See *Evidence*, 4.

SPECIAL ASSESSMENTS. See *Taxation*, 1, 3, 4.

SPECIAL VERDICT. See *Practice*, 5.

SPECIFIC PERFORMANCE.

A contract between A., a railroad company, and B., an express company, stipulated that B. should lend A. $20,000, to be expended in repairing and equipping its road, and that A. should grant to B. the necessary privileges and facilities for the transaction of all the express business over the road, the sum found to be due A. therefor, upon monthly settlement of accounts, to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B. had advanced the money, and entered upon the performance of the contract, A. conveyed all its property, including its franchises, to C. in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C. brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B., the latter, with the consent of the court, brought its bill in equity for specific performance against him, A and C. *Held*, 1. That the receiver is the only necessary party defendant. 2. That the transaction between the companies is not a license, but simply a contract for transportation creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver cannot be required to make. *Express Company* v. *Railroad Company*, 191.

STATUTE OF FRAUDS. See *New Hampshire, Statute of Frauds of.*

STATUTE OF LIMITATIONS. See *Limitations, Statute of.*

STATUTES.

The following, among others, referred to, commented on, and explained:—

1854. July 17. See *Prairie du Chien, Treaty of.*

1862. June 7. See *Direct Taxes, Sales for.*

1862. July 1. See *Constitutional Law*, 3, 4; *Railroads, Net Earnings of*, 3; *Union Pacific Railroad Company*, 1, 2.

1862. July 17. See *Abandoned and Captured Property Act; Judicial Sale*, 1; *Jurisdiction*, 8.

1863. Feb. 6. See *Direct Taxes, Sales for*, 1, 3, 6.

STATUTES (*continued*).

1863. March 12. See *Abandoned and Captured Property; Abandoned and Captured Property Act; Court of Claims*, 1; *Practice*, 3–5.
1864. June 30. See *Internal Revenue*, 5.
1864. July 2. See *Abandoned and Captured Property, Court of Claims*, 1.
1864. July 2. See *Constitutional Law*, 3, 4; *Union Pacific Rail road Company*, 1, 4, 6.
1866. July 13. See *Internal Revenue*, 5, 6.
1866. July 25. See *Land Grants*.
1866. July 27. See *Causes, Removal of*, 5.
1867. March 2. See *Contracts*, 2.
1867. March 2. See *Jurisdiction*, 16; *Town-Site Act*.
1868. Feb. 3. See *Contracts*, 2.
1868. July 20. See *Contracts*, 2; *Internal Revenue*, 1.
1869. March 1. See *Internal Revenue, Collector of*, 2.
1870. July 14. See *Internal Revenue*, 6.
1872. May 10. See *Evidence*, 5.
1872. June 1. See *Jurisdiction*, 6.
1872. June 8. See *Right of Way by Railroad Company, Priority of*.
1874. April 7. See *Jurisdiction*, 3; *Practice*, 19.
1875. March 3. See *Causes, Removal of*, 3.
1875. March 3. See *Right of Way by Railroad Company, Priority of*.
1877. March 3. See *Right of Way by Railroad Company, Priority of*.
1878. May 7. See *Constitutional Law*, 3–6; *Union Pacific Railroad Company*, 5, 6.

STATUTES, CONSTRUCTION OF.

In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted. *Platt* v. *Union Pacific Railroad Company*, 48.

STOCK, TRANSFER OF. See *Stockholder, Personal Liability of*.

A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank, which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. *National Bank* v. *Case*, 628.

STOCKHOLDER, PERSONAL LIABILITY OF.

1. A court of equity is the proper tribunal to ascertain the proportion of indebtedness chargeable to a stockholder of a bank on his personal liability. But as by the law of Georgia, as declared by the highest

STOCKHOLDER, PERSONAL LIABILITY OF (*continued*).
tribunal of that State, an action of debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation, a similar action at law will be sustained in such cases in the Circuit Court of the United States. *Mills* v. *Scott*, 25.

2. The order of the Comptroller of the Currency prescribing to what extent the individual liability of the stockholders of an insolvent national bank shall be enforced, is conclusive. *National Bank* v. *Case*, 628.

STREETS, IMPROVEMENT OF. See *Municipal Corporations*, 2–5.

SUNDAY. See *Contracts*, 7.

SUPREME COURT OF THE DISTRICT OF COLUMBIA. See *Jurisdiction*, 9.

SURETIES. See *Bankruptcy; Internal Revenue, Collector of*, 8.

TAXATION. See *Internal Revenue*.

1. Sect. 16 of a statute of Kansas, approved March 2, 1871, authorized cities of the second class to pass ordinances imposing taxes for general revenue purposes on all the taxable property within their limits, and make specified public improvements; and provided that, to meet the cost of "paving, macadamizing, curbing, and guttering of streets," assessments should be made on all the lots or pieces of ground extending along the street the distance to be improved, according to their assessed value. Sect. 17 provided that these assessments should be known as "special assessments for improvements," and be levied and collected as one tax, in addition to the general taxes; but it empowered the mayor and council to issue for the cost of such improvements bonds payable at the expiration of specified terms, and make assessments in each year, to pay the principal and interest maturing thereon during the fiscal year, upon the taxable property chargeable therewith, "as provided in the last part of the preceding section." Other sections authorized the city council to provide, when necessary, for the issue of bonds, for the purpose of funding any and all indebtedness of the city, and required it to make provision, by levying taxes payable in cash, for a sinking-fund for the redemption at maturity of "the bonded indebtedness of the city," and to levy annually taxes payable in cash on all taxable property within the city in addition to other taxes, and in amount sufficient to pay the interest and coupons, as they became due, on all the bonds of the city. Under this statute the city council of F., a city of the second class, passed an ordinance for grading, paving, guttering, and macadamizing one of its streets within prescribed limits, and for paying the cost of the work by the issue of special improvement-bonds of the city signed by the mayor,

TAXATION (*continued*).

attested by the city clerk under the corporate seal of the city, and countersigned by the city treasurer. The ordinance provided that the bonds should be paid, principal and interest, solely from special assessments, to be made upon and collected from the lots and pieces of ground upon the street the distance improved, in the manner provided in sects. 16 and 17 of the above statute. Each bond issued under this ordinance states in its margin that it is issued in accordance with sects. 16 and 17 of the statute, and in pursuance of an ordinance of the city of F., entitled an ordinance ordering the grading, curbing, guttering, and macadamizing of streets, and upon its face that it is a special improvement bond of the city of F., Kansas. The city, for value received, thereby acknowledges itself to owe, and promises to pay to the holder the amount thereof, and each bond is indorsed with the certificate of the auditor of State that it was regularly and legally issued. A., the holder for a valuable consideration of some of these bonds before they matured, brought suit against the city, and recovered judgment for the amount thereof in the ordinary form, except that the court added, that it "be enforced and collected pursuant to law, in such case made and provided." Said judgment not being paid, A. sued out a writ of *mandamus* to compel the levy of a tax. The court below held that the levy must be confined to special assessments upon the property benefited and improved. *Held*, that his remedy was not so confined, and that the city was bound to impose, in satisfaction of the judgment, a tax upon all the taxable property within her limits. *United States* v. *Fort Scott*, 152.

2. Steamboats which ply between different ports on a navigable river, may, under a State statute, be taxed as personal property by the city where the company owning them has its principal office and which is their home port, although they are duly enrolled and licensed as coasting-vessels under the laws of the United States, and all fees and charges thereon demandable under those laws have been duly paid. *Transportation Company* v. *Wheeling*, 273.

3. Where the statute authorizing a county to subscribe for stock in a railroad company, and issue its bonds therefor, limits its power to provide for the payment of them to an annual special tax of one-twentieth of one per cent, and other laws then and still in force empowered it to levy a tax for general purposes not exceeding one-half of one per cent, upon the assessed value of the taxable property of the county, — *Held*, that, in the absence of further legislation, a *mandamus* will not lie to compel the levy of taxes beyond the amount so authorized. *United States* v. *County of Macon*, 582.

4. A holder of such bonds who has recovered judgment for the amount thereof does not thereby obtain an increased right to a levy of taxes. *Id.*

TAXATION, EXEMPTION FROM. See *Constitutional Law*, 2; *Jurisdiction*, 2.

1. The act of the legislature of South Carolina passed in 1856, granting a charter to A., a railroad company, did not expressly exempt it from the provisions of the act of Dec. 17, 1841, which declares that all charters of corporations thereafter granted shall be "subject to amendment, alteration, or repeal by the legislative authority;" but conferred upon the company all the rights, privileges, and immunities granted to a certain other company which had been incorporated in 1845, with an express exemption from taxation for the period of thirty-six years, and from the operation of said act of Dec. 17, 1841. The act of 1856 was amended in 1868. *Held*, 1. That the provisions of the act of 1841 are applicable to the act of 1856, and that the latter act must be read as if it declared that the capital stock of the company and its real estate should be exempt from taxation for thirty-six years unless the legislature should, in the mean time, withdraw the exemption. 2. That if an exemption from future legislative control had been originally acquired, it ceased when the company in 1868 obtained an amendment to its charter. *Hoge* v. *Railroad Company*, 348.
2. The intention of the legislature to exempt the property of corporations from taxation must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. If a doubt arise, it must be solved in favor of the State. *Id.*
3. *Tomlinson* v. *Jessup* (15 Wall. 454) referred to and qualified. *Id.*

TENDER. See *Direct Taxes*, *Sales for*, 1, 2; *Contracts*, 6, 8.

TESTATOR. See *Decedent Estates*, 1.

TITLE. See *Evidence*, 1, 2, 5; *Land Grants*, 1.

TOWN-SITE ACT.

1. An incorporated town in Utah was situate on public lands, which were duly entered at the proper land-office by the mayor, to whom a patent was issued under the act of March 2, 1867 (14 Stat. 541). The legislature of the Territory, as authorized by that act, enacted the requisite rules and regulations for the disposal of the lots in the town, and provided that the party who was the rightful owner of possession, or occupant, or was entitled to the occupancy or possession of a lot, should on certain conditions be entitled to a deed therefor from the mayor. A mode whereby contesting claims should be determined was prescribed. A., before the lands were entered, was in the possession of a lot, and mortgaged it to B., but thereafter remained in possession. In a foreclosure suit brought in the proper court against A., wherein the process sued out was served by the marshal of the United States for that Territory, a decree was rendered whereunder he, still acting as the ministerial officer of that court, under the decision of the local courts that he was entitled so

TOWN-SITE ACT (*continued*).

to do, made sale of the lot to C. The sale was confirmed by the court, and C. conveyed the lot to D., a non-resident. A. and D. respectively claimed a deed from the mayor. *Held*, 1. That A.'s interest in the lot, before the lands were entered, could be the subject of a sale or mortgage. 2. That although this court subsequently decided that the marshal could act only in cases where the United States was concerned, his doings in the premises were those of an officer *de facto;* that by his service of the process the court acquired jurisdiction of the person of A.; that the sale under the decree extinguished A.'s right to the lot; and that D. was entitled to a deed therefor from the mayor. *Hussey* v. *Smith*, 20.

2. A., possessed of a lot in the city of Salt Lake, Utah, died in 1857, leaving a widow and minor children. Under the act of March 2, 1867 (14 Stat. 541), the mayor, Nov. 4, 1871, duly entered at the proper land-office the lands occupied as the site of the city, and received, June 1, 1872, a patent therefor, "in trust for the several use and benefit of the occupants thereof according to their respective interests." The legislature of the Territory prescribed, by a statute approved Feb. 17, 1869, rules and regulations for the execution of such trusts, and provided that the several lots and parcels within the limits of the lands so entered should be conveyed to "the rightful owner of possession, occupant, or occupants," or to such persons as might be entitled to the occupancy or possession. Shortly after A.'s death, his widow relinquished the possession of a part of the lot. She subsequently conveyed another portion thereof, and removed with her children therefrom. Another portion was sold by the administrator of A., to pay taxes assessed and debts incurred by making improvements upon the property after the latter's death. The purchaser paid full value therefor, and has, since Dec. 10, 1869, remained in the exclusive possession thereof. *Held*, 1. That A. at the time of his death had, by reason of his possession of the lot, an inchoate right to the benefit of the act of Congress, should under its provisions the lands be entered, and that his right to maintain the possession as against the other inhabitants of the city descended under the laws of Utah to his widow and children. 2. That the withdrawal of the widow and children from parts of the lot, and her voluntary surrender of all control over them, extinguished her and their rights as to such parts. 3. That, under the territorial statute, an occupant of a lot could sell and convey his possessory rights therein, before the lands were so entered. 4. That the purchaser from the administrator is entitled to a conveyance from the mayor. 5. That the widow and children of A. are entitled to a deed from the mayor conveying to them, according to their respective interests, that part of the lot whereof they were in possession at the time the lands were entered. *Stringfellow* v. *Cain*, 610.

TOWN-SITE ACT (*continued*).

3. The doctrine in *Stringfellow* v. *Cain* (*supra*, p. 610) reaffirmed. *Cannon* v. *Pratt*, 619.

4. The Probate Court of Utah has jurisdiction to determine the conflicting rights of claimants to lots forming part of the lands in that Territory entered as a town-site under the act of Congress of March 2, 1867 (14 Stat. 541), and an appeal may be taken from the judgment of that court to the District Court, within one year after it has been rendered. *Id.*

TRANSCRIPT. See *Practice*, 9.

TRESPASS. See *Evidence*, 1, 2.

TRUST. See *Partnership Property*.

A., seised of lands situate in South Carolina, died in 1856. By his last will and testament he appointed B. his executor, with power to sell them and hold the proceeds in trust for his widow and two minor children, — the interest on one-third of said proceeds to be paid to the widow, and that on the other two-thirds to be applied to the education and support of the children until they should attain the age of twenty-one years, when the principal was to be paid to them. B. sold the lands to C. in 1857 for $50,000, receiving therefor $15,000 in cash and the latter's bonds for the deferred payments, secured by a mortgage on the lands, which was duly recorded. In 1861, the widow removed to New York, where she has since resided. In 1863, C. sold the lands to D. for $100,000 in Confederate treasury notes. In that currency, C. paid his bonds to B., who surrendered them, entered the mortgage as satisfied, and invested the currency in Confederate bonds. The children having in 1866 come of age, and assigned their interest in the estate to their mother, she, on the ground that the surrender of C.'s bonds and the cancellation of the mortgage were procured by fraud, brought her bill praying that the bonds of C. be decreed to be subsisting securities, and the mortgage a valid lien on the lands. The court below decreed accordingly. *Held*, that the decree was proper. *McBurney* v. *Carson*, 567.

TRUSTEES. See *Practice*, 7.

UNION PACIFIC RAILROAD COMPANY. See *Constitutional Law*, 3–5.

1. By the third section of the act of Congress approved July 1, 1862 (12 Stat. 489), incorporating the Union Pacific Railroad Company, lands were granted to the company "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," and it was enacted that all such lands "not sold or disposed of" by the company before the expiration of three years after the completion of the entire road should be

UNION PACIFIC RAILROAD COMPANY (*continued*).

subject to settlement and pre-emption, like other lands. Upon a consideration of this and other provisions of the act, and of the amendatory act of July 2, 1864 (13 id. 356), — *Held*, 1. That these provisions should be so construed as to effect their primary object, which was to furnish aid in and during the construction of the road, and that it cannot be controlled or defeated by the secondary and subordinate purpose of opening to settlement and pre-emption such of the lands as should not be sold or disposed of within the designated period. 2. That the words "or disposed of" are not redundant, nor are they synonymous with "sold," but they contemplate a use of the lands granted different from the sale of them, and that a mortgage of them is such a use. 3. That the mortgage of them executed by the company April 16, 1867, for the purpose of raising money necessary to continue and complete the construction of the road, disposed of them within the meaning of the act, and was authorized thereby. 4. That the mortgage was an hypothecation of the fee, and not merely of an estate determinable at the expiration of three years from the completion of the road, and the debt it was given to secure not having matured, the lands are not subject to pre-emption. *Sed quære*, whether the remnants that may be unsold when the mortgage debt shall be paid will not then be subject to pre-emption. *Platt* v. *Union Pacific Railroad Company*, 48.

2. The act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862 (12 Stat. 489), after providing for the issue of patents for land and of bonds to the Union Pacific Railroad Company and other companies from time to time, as successive sections of their respective roads should be completed, requires the companies to perform all government transportation of mails, troops, &c., and to credit the compensation therefor on the government loan; and then adds, that "after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." *Held*, 1. That the liability of the Union Pacific Railroad Company to make this payment accrued when it reported, and the President of the United States accepted, its road as completed, for the purpose of issuing the bonds, though the acceptance was provisional, and security was required that all deficiencies in construction should be supplied. 2. That the company having obtained the bonds and agreed in regard to the security, is estopped from denying that the road was then completed. *Union Pacific Railroad Company* v. *United States*, 402.

3. The "earnings" of the road include all the receipts arising from the company's operations as a railroad company, but not those from the public lands granted, nor fictitious receipts for the transporta-

UNION PACIFIC RAILROAD COMPANY (*continued*).

tion of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from the gross earnings all the ordinary expenses of organization and of operating the road, and expenditures made *bona fide* in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company. *Id.*

4. The government bonds issued to the company were declared to be a first lien on the road and property; the act of July 2, 1864 (13 id. 356), authorized the company to issue an equal amount of first-mortgage bonds, to have priority over the government bonds. *Held*, that this priority authorized the payment of the interest accruing on these first-mortgage bonds out of the net earnings of the road, in preference to the five per centum payable to the government, which is only demandable out of the excess in each year. *Id.*

5. Neither the debt of the Union Pacific Railroad Company nor that of the Central Pacific Railroad Company to the United States is paid by depositing and investing the sinking-fund in the manner prescribed in the act of May 7, 1878. 20 Stat. 56. *Sinking-Fund Cases*, 700.

6. Retaining in the fund the one-half of the earnings for services rendered to the government by those companies respectively, which by the act of July 2, 1864 (13 Stat. 356), was to be paid to them, does not release the government from such payment. Although kept in the treasury, the fund is owned by them, and they will be entitled to the securities whereof it consists which remain undisposed of when the debt chargeable upon it shall be paid. Under the circumstances, such retaining is, in law, a payment to them. *Id.*

UTAH. See *Criminal Law; Jurisdiction*, 16; *Practice*, 19; *Town-Site Act.*

WAIVER. See *Condition; Practice*, 21.

WASHINGTON, TREATY OF.

An award made by the commission organized under the treaty between the United States and Great Britain of May 8, 1871 (17 Stat. 863), in favor of a claimant against the United States, passes to his assignee in bankruptcy. *Phelps* v. *McDonald*, 298.

WILL.

A testator in whom was the legal title to lands, which he had sold by a written contract, can transfer by his will both such title and the notes given for the purchase of them, and the devisee will stand towards the purchaser in the same position that the testator did. *Atwood* v. *Weems*, 183.

WISCONSIN. See *Municipal Bonds*, 2.

WORDS.

1. In the phrase "sold or otherwise disposed of," where the same occurs in the third section of the act of July 1, 1862 (12 Stat. 489), incorporating the Union Pacific Railroad Company, the words "or otherwise disposed of" are not synonymous with "sold," but they contemplate a use by the company of the lands granted different from the sale of them. A mortgage of them is such a use. *Platt* v. *Union Pacific Railroad Company*, 48.
2. The words, "upon which they have respectively made improvements," in the act of July 17, 1854 (10 Stat. 304), have exclusive reference to "other unsurveyed lands," and do not qualify the provision touching "other unoccupied lands." *Myrick* v. *Thompson*, 291.
3. "District," where it occurs in the sixth section of the act of June 7, 1862 (12 Stat. 422), signifies a part or portion of a State. The city of Memphis, Tenn., was, therefore, a district within the meaning of that section. *Keely* v. *Sanders*, 441.

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